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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 128

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, ET AL., APPELLANTS,

vs.

STATE MILK COMMISSION

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

FILED JUNE 16, 1953

Probable jurisdiction noted October 12, 1953

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[fol. 1] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, VIRGINIA

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, a body corporate; and FLORENCE E. CANNON, Chairman, F. FREELAND CHEW, ALFRED E. FRISBIE, ROBERT W. COX, DANIEL A. DUGAN, Members of the County Board, Petitioners,

vs.

STATE MILK COMMISSION, Defendant

PETITION FOR APPEAL—filed February 23, 1951

To the Honorable Judge of the Circuit Court:

Your petitioners represent unto the Court as follows:

1. This petition for appeal is made pursuant to Section 3-371 of the 1950 Code of Virginia, and involves a statute enacted and amended by the General Assembly of the Commonwealth of Virginia, known as the Milk and Cream Act, as set forth in sections 3-346 to 3-383, inclusive, 1950 Code of Virginia.

2. The County of Arlington, Virginia, is a purchaser of milk, and the above-named petitioners, members of the Arlington County Board, are residents of Arlington County, and they are purchasers and consumers of milk and cream at retail delivered to them in said county, and said members of the Arlington County Board are representative of numerous other purchasers and consumers of milk and cream residing in said county; and in their capacity on said County Board said members are charged with the duty of taking such measures as they may deem expedient to secure and promote the health, safety, and general welfare of the inhabitants of said county.

3. By an order, rule or regulation designated as *Arlington-Alexandria Market—Order No. 4*, made, adopted, and posted by the State Milk Commission of the Commonwealth of Virginia on January 17, 1951, which by its terms became effective on 12:01 A.M., January 21, 1951, said Commission increased the retail and wholesale prices of milk and

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cream in Arlington County; and this petition is filed within forty (40) days from the time said order, rule, or [fol. 2] regulation became effective. Petitioners and numerous consumers of milk and cream in said county are aggrieved by said order and the rules and regulations of said Commission for the supervision and control of the Arlington-Alexandria Market, as stated herein.

4. The aforesaid order was issued after notice and hearing by the State Milk Commission which did not give actual notice of or bring in issue the matter of increasing milk and cream prices in the Arlington-Alexandria Market, which includes Arlington County; and no findings of fact or decision were made or published by said Commission with respect to such order, rules and regulations, so far as known to petitioners.

5. A major proportion of the milk and cream purchased and consumed by residents in Arlington County, including milk and cream consumed by said petitioners and their families, is processed and bottled in the District of Columbia by distributors which transport such milk and cream in motor vehicles from said District and deliver such milk directly to the residences of retail consumers in Arlington County, Virginia, in the original packages, which movements and sales of milk and cream were and are in interstate commerce; and the State Milk Commission presumed to fix prices of milk and cream so moving in interstate commerce, and by said Order No. 4 such prices were increased by the Commission.

6. The increased prices fixed by the aforesaid order apply to milk or cream produced within a restricted geographical area limited by the rules and regulations of the State Milk Commission for the supervision and control of the Arlington-Alexandria Market; and with certain exceptions the State Milk Commission has restricted and limited the sources of supply of milk to prescribed areas and has prohibited shipments of milk from numerous other points in other States in interstate commerce; and such restrictions unduly limit the sources of supply of milk to consumers and purchasers in Arlington County, particularly from points outside the State of Virginia.

7. The above-described regulation by the State Milk Com-

mission is in a field occupied by Act of Congress of the United States (7 U.S.C. §601 et seq., particularly §608 c), according to which the Secretary of Agriculture is and has [fol. 3] been authorized to regulate the handling of milk and "minimum prices to be paid to producers or associations of producers" of milk "as is in the current of interstate or foreign commerce." Such pricing and other regulations were applied to the area surrounding and including Arlington County by order of the Secretary of Agriculture, effective November 3, 1945, a certified printed copy of which is attached hereto as Exhibit A hereof. By further order of the Secretary of Agriculture, effective March 31, 1947, a certified photostatic copy of which is attached hereto as Exhibit B hereof, said regulation was terminated by the producers of milk as the Federal statute permits them to do.

8. The above-mentioned Milk and Cream Act of Virginia contains the following saving clause as set forth in section 3-381 of the 1950 Code of Virginia, to-wit:

> "No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto."

9. Your petitioners object to the said orders, rules and regulations of the said State Milk Commission in this, to-wit:

> (a) The said State Milk Commission has no authority or jurisdiction to regulate the prices of milk or cream moving in interstate commerce to or from a point in Virginia from or to a point outside Virginia.
>
> (b) The said State Milk Commission has no authority or jurisdiction to regulate the retail prices of milk or cream which have been processed and bottled in the distributors' plants in the District of Columbia and transported by trucks of any such distributor from the District of Columbia and delivered in the original package or bottle by such distributor directly to the residence doors of consumer-purchasers at retail in Arlington County, State of Virginia.

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(c) The said State Milk Commission has no authority or jurisdiction to regulate interstate commerce in milk or cream in the Arlington-Alexandria Market because of the Act of Congress mentioned in paragraph seven of this petition, particularly while there is absence of con- [fol. 4] current exercise of jurisdiction by the Secretary of Agriculture over the area included within the Arlington-*Arlington* Market as provided by such Act of Congress.

(d) The said State Milk Commission has no authority or jurisdiction to regulate and obstruct the supply of milk or cream moving to Arlington County, Virginia, from sources outside the State of Virginia in interstate commerce.

10. Your petitioners further object to the procedure of the State Milk Commission in that there was a denial to your petitioners, and all other consumers of milk and cream in the Arlington-Alexandria Market, of a decision reached after fair and reasonable notice of proposed increases of prices of milk and cream and hearing on such proposals, and such action by the State Milk Commission was unreasonable and capricious.

Wherefore, your petitioners pray, for the reasons stated herein, and for other reasons which may be assigned at the hearing on appeal, that the Court grant relief to petitioners and adjudge, declare, decree, and order, as follows, to-wit:

(1) That said Order No. 4 and the Rules and Regulations of the State Milk Commission for the Supervision and Control of the Arlington-Alexandria Market are null and void, and beyond the authority and jurisdiction of the said Commission, in so far as they relate to interstate commerce in milk or cream as specified in paragraph nine hereof.

(2) That by appropriate order the Court remand the matters and things involved in this proceeding to the State Milk Commission with directions to recon-

sider the order, rules and regulations applying to the Arlington-Alexandria Market, as follows, to-wit:

(a) Issue another notice and hold a further hearing upon the question of increasing prices of milk or cream over those in effect prior to said Order No. 4, effective January 21, 1951, and for the taking of such further testimony and evidence as may be deemed material and relevant at such further hearing.

[fol. 5] (b) Revise and change said order and the Commission's rules and regulations so as to clearly state that the prescribed prices and other rules and regulations do not apply to interstate commerce beyond the authority and jurisdiction of said Commission, particularly as specified in paragraph nine hereof.

(c) Resubmit to this Court the revised, changed, or amended rules and regulations for such further review as may be necessary for this Court to determine whether the State Milk Commission has acted within its authority and jurisdiction, and in conformity with the directions of this Court.

And your petitioners will ever pray, etc.

The County Board of Arlington County, Virginia, By its members: (S.) Florence E. Cannon, Chairman, F. Freeland Chew, Member, Alfred E. Frisbie, Member, Robert W. Cox, Member, Daniel A. Dugan, Member, Malcolm D. Miller, Attorney for Arlington County Board, Munsey Building, Washington 4, D. C., or 1838 N. Quintana Street, Arlington, Virginia.

[fol. 6] Certificate of service (omitted in printing).

[fol. 7] Proof of Service of Sheriff (omitted in printing).

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(Here follows Photolithograph, side folio 8)

EXHIBIT "A"
H F S with Petition - Feb. 23, 1951

6A

United States of America

H F S
With Petition
FEB. 23, 1951

Department of Agriculture

...uary 1951. , 19

...suant to Title 28, United States Code, Section 1733, I hereby

...t there is now in this Department the following-described document:

... Order, as Amended, Regulating the Handling of Milk in the ... Washington, D. C., Marketing Area - issued by the Secretary of Agriculture on October 26, 1946, effective November 3, 1946

...at a ... correct, and compared copy thereof is attached hereto.

By direction of the Secretary of Agriculture, and in witness whereof, the said copy is hereby authenticated, the seal of the Department of Agriculture is affixed hereto, and I have signed my name hereto on the day and year first above written.

Clarence H. Girard
Associate SOLICITOR

[fol. 9] **Order No. 45, as Amended**

Effective November 3, 1945

United States Department of Agriculture
Production and Marketing Administration

T. 7 Ch. IX, Code of Fed. Regs.

Marketing Orders—Part 945

Order, as Amended, Regulating the Handling of Milk in the Washington, D. C., Marketing Area

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(48 Stat. 31, 670, 675; 49 Stat. 750; 50 Stat. 246; 7 U. S. C. 1940 ed., 601 *et seq.*)

§ 945.1 Findings and determinations. (a) Findings. Pursuant to Public Act No. 10, 73d Congress (May 12, 1933), as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (hereinafter referred to as the "act"), and the rules of practice and procedure covering the formulation of marketing agreements and orders (7 CFR, Cum. Supp.,

900.1 *et seq.;* 10 F. R. 11791), a public hearing was held upon certain proposed amendments to the tentatively approved marketing agreement and to the order, as amended, regulating the handling of milk in the Washington, D. C., marketing area. Upon the basis of the evidence introduced at such hearing and the record thereof, it is hereby found that:

(1) The order regulating the handling of milk in the said marketing area, as amended and as hereby amended, and all of the terms and conditions of said order, as amended and as hereby amended, will tend to effectuate the declared policy of the act;

(2) The prices calculated to give milk produced for sale in the said marketing area a purchasing power equivalent to the purchasing power of such milk as determined pursuant to §§ 2 and 8 (c) of the act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supplies of and demand for such milk, and the minimum prices specified in the said order are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

[fol. 10] (3) The said order regulates the handling of milk in the same manner as and is applicable only to persons in the respective classes of industrial and commercial activity specified in the said tentatively approved marketing agreement upon which a hearing has been held.

(b) Determinations. It is hereby determined that handlers of at least 50 percent of the volume of milk which is marketed within the said marketing area refused or failed to sign the tentatively approved marketing agreement regulating the handling of milk in the said marketing area; and it is hereby determined that:

(1) The refusal or failure of such handlers to sign such tentatively approved marketing agreement tends to prevent the effectuation of the declared policy of the act;

(2) The issuance of this order, as amended, is the only practical means pursuant to the declared policy of the act to advance the interests of the producers of milk which is produced for sale in the said marketing area; and

(3) The issuance of this order is approved or favored by at least three-fourths of the producers who participated in a referendum on the question of the approval of this order, as amended, and who during the determined representative period, were engaged in the production of milk for sale in the said marketing area.

§ 945.2 Order relative to handling. It is therefore ordered that on and after the effective date hereof the handling of milk in the Washington, D. C., marketing area shall be in conformity to and in compliance with the terms and conditions of this order, as amended.

§ 945.3 Definitions. The following terms shall have the following meanings:

(a) "Act" means Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended.

(b) "Secretary" means the Secretary of Agriculture or any officer or employee of the United States who is, or who may hereafter be, authorized to exercise the powers and to perform the duties of the Secretary of Agriculture.

(c) "Washington marketing area," hereinafter referred to as the "marketing area," means (1), the territory within the boundary lines of the District of Columbia and (2), that territory in the State of Maryland included between the District of Columbia line and the following boundaries: Beginning at the junction of the southeastern boundary of the District of Columbia line and Route 224, thence south on Route 224 to Oxen Hill, thence east on St. Barnaby Road to Gordon's Corner, thence northeast on Suitland-Silver Hill Road continuing Suitland to the Junction of Route 4, thence northwest on Route 4 to Hillside, thence north on Crystal Spring Road continuing through Capitol Heights to Sixty-first Street, thence north on Sixty-first Street to the District of Columbia line, thence northeasterly and thence northwesterly along said District line to Kenilworth Avenue, thence north on Kenilworth Avenue to Defense Highway, thence east on Defense Highway, thence north on Edmonston Road to Greenbelt, and around the outside limits of Greenbelt, thence returning on Edmonston Road to Branchville Road, thence west on

[fol. 11] Branchville Road to Baltimore-Washington Boulevard, thence south on the Baltimore-Washington Boulevard to Metzerott Road, thence west on Metzerott Road to Riggs Valley Road, thence to County Road, thence west to Blair Road, thence north to Piney Branch Road, continuing north on Piney Branch Road to White Oak at intersection of Colesville Road, thence continuing north on Colesville Road to Colesville, thence west on Glenmont Road to Brookville Road, thence south on Brookville Road to Wheaton, thence on Lincoln Avenue to Kensington, thence west on Knowles Avenue and continuing west on Strathmore Avenue to Rockville Pike, thence south on Rockville Pike to Grosvenor Lane, thence west on Grosvenor Lane to Old Georgetown Road, thence north on Old Georgetown Road to Bellsmill Road, thence west on Bellsmill Road to the Seven Locks Road, thence south on Seven Locks Road to Bradley Road, thence west on Bradley Road continuing to Conduit Road, thence southeasterly on Conduit Road to the District of Columbia line, and (3), that territory in the Commonwealth of Virginia included within the following boundaries:

Beginning at the junction of the westerly boundary of the Arlington County line and the Potomac River, thence southwesterly along the said county line to its junction with Road 689, thence westerly on Road 689 to its junction with Road 695, thence southerly along Road 695 crossing Road 694 and Highway 7 to the junction of Road 695 and Road 650, thence southerly on Road 650 crossing Highway 211 and Highway 50 to its junction with Road 709, thence southeasterly on Road 709 to its junction with Road 710, thence southerly on Road 710 to is junction with Highway 236; thence from this point in a straight line southerly to the junction of Roads 617 and 620, thence southerly on Road 617 to its junction with Road 636, thence southerly along Road 636 to Highway 9, thence in a straight line southwesterly from the junction of Road 636 and Highway 9 to the junction of Roads 641 and 642 in Prince William County, thence southeasterly along Road 642 to Road 640, thence northeasterly along Road 640 to Road 639, thence easterly along Road 639 to Highway 9; thence southeasterly along Highway 9 to Highway 1, south of Woodbridge, thence cross Highway 1 and continue southeasterly

along Road 637 to Dawson Beach, thence in a straight line due east to the Potomac River, thence up said river to its junction with the western boundary of the Arlington County line.

(d) "Person" means any individual, partnership, corporation, association, or any other business unit.

(e) "Producer" means any person, irrespective of whether such person is also a handler, who produces, under a dairy farm inspection permit issued by the applicable health department as the result of a farm inspection and other applicable health department regulations, milk which is delivered to a plant approved by the applicable health department for the handling of milk disposed of for fluid consumption as milk in the marketing area and from which plant milk, skim milk, milk drinks, or cream is disposed of for fluid consumption in the marketing area.

(f) "Handler" means any person, irrespective of whether such person is also a producer or a cooperative associ-
[fol. 12] ation of producers, who engages in such handling of milk, skim milk, or cream for fluid consumption in the marketing area as is in the current of interstate commerce, or which directly burdens, obstructs, or affects such commerce in milk and its products: *Provided,* That this definition shall not include producers or cooperative associations of producers with respect to milk or cream not handled through their own receiving or bottling plant.

(g) "Market administrator" means the person designated pursuant to § 945.4 as the agency for the administration hereof.

(h) "Cooperative association" means any cooperative association of producers which the Secretary determines (1) to have its entire activities under the control of its members and (2) to have and to exercise full authority in the sale of milk of its members.

(i) "Delivery period" means the current marketing period from the first to the last day of each month, both inclusive.

(j) "Producer milk plant" means any milk plant approved by the applicable health department for the handling of milk disposed of for fluid consumption as milk in the marketing area and currently used for any or all of the

handling functions of receiving, weighing (or measuring), sampling, cooling, pasteurizing, bottling, or other preparation of milk delivered by producers, as defined in (e) of this section, for fluid sales or disposition as milk, skim milk, milk drinks, or cream for fluid consumption in the marketing area.

(k) "Emergency milk" means all milk except producer milk, and all skim milk, cream, cottage cheese, condensed skim milk, whole milk powder, and skim milk powder received at a producer milk plant except such products received from another producer milk plant.

(l) "Producer plant test" means the weighted average butterfat test of all producer milk received at a "producer milk plant" during a delivery period as determined by the market administrator.

(m) "Producer milk" means all milk received either directly or through another producer milk plant by a handler and produced by a producer as defined in (e) of this section.

§ 945.4 Market administrator. (a) Designation. The agency for the administration hereof shall be a market administrator who shall be a person selected by the Secretary. Such person shall be entitled to such compensation as may be determined by, and shall be subject to removal at the discretion of, the Secretary.

(b) Powers. The market administrator shall:

(1) Administer the terms and provisions hereof;

(2) Report to the Secretary complaints of violations of the provisions hereof; and

(3) Make rules and regulations to effectuate the terms and provisions hereof.

(c) Duties. The market administrator shall:

(1) Within 45 days following the date upon which he enters upon his duties, execute and deliver to the Secretary a bond, conditioned upon the faithful performance of his duties, in an amount and with surety thereon satisfactory to the Secretary;

[fol. 13] Pay, out of the funds provided by § 945.11, the cost of his bond, his own compensation, and all other ex-

penses necessarily incurred in the maintenance and functioning of his office;

(3) Keep such books and records as will clearly reflect the transactions provided for herein and surrender the same to his successor or to such other person as the Secretary may designate;

(4) Publicly disclose to handlers and producers, unless otherwise directed by the Secretary, the name of any person who, within 2 days after the date upon which he is required to perform such acts, has not (i) made reports pursuant to § 945.5, or (ii) made payments pursuant to § 945.10;

(5) Promptly verify the information contained in the reports submitted by handlers; and

(6) Check the weight and butterfat test of milk received from producers by each handler each month and report the results of the butterfat tests to producers or to their cooperative association.

The market administrator may designate an independent agency to check the weight and butterfat test of such receipts by handlers.

§ 945.5 Reports of handlers. (a) Submission of Reports. Each handler shall report to the market administrator, in the detail and on forms prescribed by the market administrator, as follows:

(1) On or before the 10th day after the end of each delivery period: (i) the receipts of milk at each producer plant from producers, including milk produced by such handler and the weighted average test thereof; (ii) the receipts and butterfat content of milk, skim milk, cream, and milk products at each producer milk plant for the account of a handler or a cooperative association, from each producer milk plant and each emergency milk source; (iii) the utilization of all milk, skim milk, cream, and milk products received and the butterfat content of each use or product thereof; (iv) the receipts at each producer milk plant from new producers and the average test thereof; (v) the name and address of each new producer; (vi) the names of handlers from whom or to whom milk, skim milk, cream, and milk products was received or delivered; and (vii) the

address of each emergency milk source from which milk, skim milk, cream, and milk products was received at a producer milk plant.

(2) Within 10 days after the market administrator's request with respect to any producer for whom such information is not in the files of the market administrator and with respect to a period or periods of time designated by the market administrator: (i) the name and address of such producer; (ii) the total pounds of milk delivered and the average butterfat test thereof; (iii) the farm scores and cattle scores recorded by the respective health departments requiring permits to sell milk to handlers in the marketing area; and (iv) the number of days upon which deliveries were made.

(3) On or before the 19th day after the end of each delivery period, at the request of the market administrator, his producer pay roll which shall show for each producer: (i) the total delivery of milk with the average butterfat test thereof; (ii) the premium rate paid; (iii) the net amount of payment made pursuant to § 945.10; and (iv) [fol. 14] the deductions and charges made by the handler with authorizations therefor.

(b) Verification of Reports. Each handler shall provide the market administrator or his agent with reasonable access to those records and facilities which are necessary for:

(1) The verification of the information contained in the reports submitted in accordance with this section;

(2) The verification of the payments required by § 945.10;

(3) The checking of the weighing and sampling of milk, skim milk, cream, and milk products received by such handlers; and

(4) Determining the utilization of milk, skim milk, cream, and milk products by the handler.

§ 945.6 Classification of milk. (a) Milk to be Classified. All milk, skim milk, cream, and milk products received by each handler in his producer milk plant shall be classified by the market administrator in the classes set forth in (b) of this section.

(b) Classes of Utilization. Except as provided in (c) of this section, the classes of utilization shall be as follows:

(1) Class I. All milk, skim milk, cream, and milk products which are disposed of for fluid consumption as milk, skim milk, milk drinks, and buttermilk, and all milk not accounted for in Classes II and III.

(2) Class II. All milk, skim milk, cream, and milk products which are used in the manufacture of, or disposed of in, cottage cheese, pot cheese, or baker's cheese, and cream for fluid consumption.

(3) Class III. All milk, skim milk, cream, and milk products used in a producer milk plant as, or disposed of to a plant engaged in the wholesale manufacture of, ice cream and similar frozen dairy products and mixes therefor, butter, roller or spray nonfat dry milk solids, condensed milk, condensed skim milk, or cheese other than cottage, pot, or baker's cheese, and used as such.

(c) Transfers of Milk, Skim Milk, and Cream. (1) Milk and skim milk disposed of by a handler to a plant, other than a producer milk plant, outside the area from which milk was disposed of as Class I milk for fluid use outside the marketing area shall be classified as Class I, not to exceed the quantity of Class I milk at such plant, and cream disposed of by a handler to a plant outside the area from which milk or cream was disposed of for fluid use outside the marketing area shall be classified as Class II, not to exceed the quantity of Class II milk at such plant.

(2) Milk, skim milk, and cream transferred from one handler's producer milk plant to another handler's producer milk plant may be classified according to an agreement for use by such handlers: *Provided*, That an equivalent quantity of milk not otherwise classified was used by the receiving handler in the class use agreed upon, and in the absence of an agreement shall be classified in Class I: *And provided further*, If either or both handlers have purchased emergency milk, the market administrator shall classify such transferred milk, skim milk, and cream so as to return to the producers at both plants the highest class utilization according to the rules for allocation of producer milk and emergency milk in § 945.6 (f) and (g).

[fol. 15] (d) Computation of Milk in Each Class. For each delivery period the market administrator shall correct for mathematical errors the report submitted by each handler and compute from the corrected report the amount of Class I milk, Class II milk, and Class III milk, as follows:

(1) Determine the total pounds of milk to be accounted for as follows: add into one sum (i) the total pounds of milk received from producer's and handler's own farm production and (ii) the total pounds of milk, skim milk, and cream received, and the total pounds of milk, skim milk, and cream received in the form of other milk products (*a*) from emergency milk sources and (*b*) from other producer milk plants.

(2) Determine the total pounds of butterfat to be accounted for as follows: (i) multiply by its average butterfat test the weight of the milk received from producer's and handler's own farm production, and (ii) multiply by its weighted average butterfat test the weight of the milk, skim milk, cream, and milk products received (*a*) from emergency milk sources, and (*b*) from other producer milk plants, and (iii) add the resulting amounts into one sum.

(3) Determine the total pounds of Class I milk as follows: (i) convert to pounds the quantity of milk, skim milk, buttermilk, and milk drinks disposed of for fluid consumption and (ii) add to this amount any plus amount computed as follows: (*a*) compute the pounds of butterfat contained in the pounds of Class I milk by multiplying the weight of each product by its average butterfat test and adding together the resulting amounts, (*b*) add to this amount the pounds of butterfat in Class II milk and Class III milk, (*c*) subtract the total pounds of butterfat thus computed from the total pounds of butterfat received computed pursuant to (2) of this paragraph, and (*d*) divide the difference in butterfat pounds by the producer plant test.

(4) Determine the total pounds of Class II milk as follows: (i) multiply the weight of the cream disposed of for fluid consumption and the cottage, pot, or baker's cheese each by its average butterfat test, add together the re-

sulting amounts, and divide by the producer plant test; (ii) add to this amount any amount by which the total product pounds of cream disposed of for consumption as fluid cream and the pounds of cream and skim milk disposed of in cottage, pot, or baker's cheese exceeds the amount computed pursuant to (i) of this subparagraph; and (iii) subtract from the amount computed pursuant to (ii) of this subparagraph any amount by which that amount when added to the amount of Class I milk determined pursuant to (3) of this paragraph exceeds the total pounds of milk received computed pursuant to (1) of this paragraph.

(5) Determine the total pounds of Class III milk as follows: (i) multiply the weight of each of the products of Class III milk by its average butterfat test, add together the resulting amounts, and divide by the producer plant test; (ii) add to this amount any amount by which the total product pounds of milk, skim milk, and cream disposed of in Class III products exceeds the amount computed pursuant to (i) of this subparagraph; and (iii) subtract from the amount computed pursuant to (ii) any amount by which that amount when added to the amount of Class I [fol. 16] milk determined pursuant to (3) of this paragraph and Class II milk determined pursuant to (4) of this paragraph exceeds the total pounds of milk received computed pursuant to (1) of this paragraph.

(e) Allocation of Producer Milk. (1) Producer milk received by a handler shall first be allocated to Class I but not to exceed the Class I pounds as determined, pursuant to (d) (3) of this section, less the pounds of emergency milk allocated to Class I pursuant to the proviso in (f) of this section.

(2) Producer milk received by a handler in excess of such Class I utilization shall be allocated to Class II but not to exceed the Class II pounds as determined pursuant to (d) (4) of this section.

(3) Producer milk received by a handler in excess of Class I and Class II utilization shall be Class III.

(f) Allocation of Emergency Milk. Emergency milk received at a producer milk plant shall be allocated to Class

III milk, except that emergency milk may be allocated to Class II milk to the extent that Class II use exceeds the amount of all producer milk less the amount of producer milk classified as Class I milk, and emergency milk may be allocated to Class I milk only to the extent that the total amount of Class I milk exceeds the total amount of producer milk received: *Provided*, That emergency milk purchased in the form of milk and disposed of to the armed services at delivery points more than 21 miles from the milestone in Washington, D. C., may be allocated to Class I milk, if the quantity of emergency milk allocated to such Class I sales does not exceed the quantity of such sales less the excess, if any, of producer milk receipts over the total of all Class II milk disposed of within the 21-mile area as described above and all other Class I milk.

(g) Responsibility of Handlers in Establishing the Classification of Milk. In establishing the classification of any milk received at a producer milk plant, the burden rests upon the handler who received the milk directly from producers or from emergency sources to prove that it should not be classified as Class I.

§ 945.7 Minimum prices. (a) Class Prices. Each handler shall pay not less than the following prices per hundredweight of 4 percent milk, subject to (b), (c), (d), (e), and (f) of § 945.10 for milk received from producers and associations of producers at a producer milk plant.

(1) Class I. The price for Class I milk shall be $4.05.

(2) Class II. The price for Class II shall be $3.55.

(3) Class III. The price for Class III milk shall be the sum of the respective values of butterfat and skim milk calculated as follows by the market administrator:

(i) Butterfat. Add all weekly quotations (using the midpoint of any weekly range as one quotation) per 40-quart can of 40 percent sweet cream approved for "Pennsylvania" and all such quotations for sweet cream approved for "Pennsylvania, Newark, and lower Merion Township" in the Philadelphia, Pennsylvania, market, as reported for each week ending within the month by the United States Department of Agriculture, divide by the

number of quotations, subtract $1.00, divide by $33.48, multiply by 4.

(ii) Skim milk. The weighted average selling price, wholesale at manufacturers' plants, of all spray and roller [fol. 17] dried nonfat milk solids for human consumption, as published by the United States Department of Agriculture for the previous month, shall be used in determining the skim value as follows:

Quotation per pound:	*Class III skim value*
$0.065 or below	.....
$0.066 to $0.075	$0.07½
$0.076 to $0.085	.15
$0.086 to $0.095	.22½
$0.096 to $0.105	.30
$0.106 to $0.115	.37½
$0.116 to $0.125	.45
$0.126 to $0.135	.52½
$0.136 to $0.145	.60
$0.146 to $0.155	.67½
$0.156 to $0.165	.75
$0.166 to $0.175	.82½
$0.176 to $0.185	.90
$0.186 to $0.195	.97½

(b) Emergency Price Provision. Whenever the provisions hereof require the market administrator to use specific price (or prices) for milk or any milk product for the purpose of determining class prices or for any other purpose, the market administrator shall add to the specified price the amount of any subsidy or other similar payment being made by any Federal agency, in connection with the milk, or product, associated with the price specified: *Provided*, That if for any reason the price specified is not reported or published as indicated, the market administrator shall use the applicable maximum uniform price established by regulations of any Federal agency plus the amount of any subsidy or other similar payment: *Provided further*, That if the specified price is not reported or published and there is no applicable uniform price, or if the specified price is not reported or published and the Secretary determines that the market price is below the applicable maximum uni-

form price, the market administrator shall use a price determined by the Secretary to be equivalent to or comparable with the price specified.

§ 945.8 Application of provisions. (a) Handlers who are also Producers. No provision hereof shall apply to a handler whose only sources of milk supply are receipts from his own production or from other handlers, except that such handler shall make reports to the market administrator at such time, to such extent, and in such manner, as the market administrator may request and shall permit the market administrator to verify such reports.

§ 945.9 Determination and announcement of uniform prices. (a) Computation and announcement for each handler of uniform prices to be paid producers. On or before the 12th day after the end of each delivery period, the market administrator shall announce the Class III price and the uniform price per hundredweight of 4 percent milk to be paid producers by each handler for such delivery period. The market administrator shall compute the uniform prices of milk received from producers as follows:

(1) Multiply the hundredweight of milk received from producers that were allocated to each class by the prices applicable pursuant to § 945.7 (a);

(2) Add together the resulting amounts;

[fol. 18] (3) Divide the result obtained by the total hundredweight of milk received from producers; and

(4) Subtract for each of the delivery periods of April, May, and June, 30 cents per hundredweight and add for each of the delivery periods of September, October, and November, the rate per hundredweight computed pursuant to § 945.10 (g) (3).

(b) Announcement of Other Market Information. As soon after the 11th day after the end of each delivery period as such information becomes available, the following data shall be announced publicly by the market administrator:

(1) The total pounds of milk and the butterfat contained therein received from producers and the total pounds of such milk allocated to each class.

(2) The total pounds of emergency milk, itemized by products, received at producer milk plants and the butterfat contained therein.

(3) The total sales of handlers of each product named in § 945.6, with the butterfat contained therein.

§ 945.10 Payments for Milk. (a) Time and Method of Payment. On or before the 14th day after the end of each delivery period, each handler shall make payments, subject to other paragraphs of this section and subject to § 945.11 (b), for all milk received from producers during the delivery period at the prices announced pursuant to § 945.9 to each producer or association of producers: *Provided*, That payments due under this section to any producers who have given authority to a cooperative association to receive payment for their milk, shall be made to the cooperative association at the uniform price computed pursuant to § 945.9 (a) (1), (2), and (3), without the adjustment provided in (4) of § 945.9 (a).

(b) Butterfat Content of Milk Received From Producers. In making payments to each producer, pursuant to (a) of this section, each handler shall add to the price not less than, or subtract from the price not more than, as the case may be, for each one-tenth of 1 percent of butterfat content above or below 4 percent in milk received from such producer, 6 cents per hundredweight. The butterfat content of milk received from producers shall be determined by taking the average of not less than five separate butterfat tests made from fresh samples during each delivery period. The butterfat content of emergency milk shall be determined at the producer's milk plant where it is received. The market administrator may designate an independent laboratory to make these tests.

(c) Location Adjustments to Producers. (1) In making payments pursuant to (a) of this section, handlers may deduct 18 cents per hundredweight with respect to milk received from producers at a plant in which no milk is bottled or finally processed for distribution to consumers and which is located more than 35 miles from the milestone in the District of Columbia and 1½ cents additional for each 10 miles in excess of 35 miles from that milestone:

Provided, That handlers may make such deduction on milk received at such plant by transfer of a truck route to such plant from another producer milk plant during the first four full delivery periods after such transfer, only if such milk was transferred from a plant at which a similar [fol. 19] or greater deduction was permitted. If such milk was transferred from a plant at which no deduction or a smaller deduction was permitted, the smaller deduction, or no deduction, as the case may be, must be used in computing payments until four full delivery periods have elapsed from the time of transfer.

(2) In making payments pursuant to (a) of this section, a handler whose plant is located in that part of the marketing area which is within the State of Maryland, and for which plant he does not hold a permit to distribute milk in the District of Columbia or that part of the marketing area within the State of Virginia, may deduct 46 cents per hundredweight with respect to Class I milk received from producers.

(d) Premiums To Be Paid by Handlers. (1) In making payments pursuant to (a) of this section, handlers shall pay the applicable premium rates set forth in this paragraph for each producer's deliveries on that quantity of milk received from each producer which represented such producer's proportionate share of all producer milk classified as Class I and Class II. The premium rates referred to in this paragraph shall be determined from the following schedule with respect to the cattle scores and farm scores recorded for each producer by the respective health departments requiring permits to sell milk to handlers in the marketing area:

Farm Score	With cattle score under 95 *Per cwt.*	With cattle score 95 or over but under 98 *Per cwt.*	With cattle score 98 or over *Per cwt.*
Under 80	.....	.....	.....
80.0-84.9	.....	$0.03	$0.09
85.0-89.9	$0.02	.08	.14
90.0-94.9	.08	.14	.20
95.0-97.9	.20	.26	.32
Over 97.9	.31	.37	.43

(2) If more than one score has been recorded during any month, the simple average of the scores so recorded shall be used. Producers who are subject to health department regulations which do not provide for cattle scores in their scoring system shall be considered as having a cattle score of 98 or over and the score given them by the health department shall be considered the farm score for the purpose of applying premiums under the above schedule.

(e) Any handler may make uniform payments to producers in addition to the minimum payments required by this section: *Provided*, That such additional payments, except payments made to producers supplying special milk to handlers for premium sales, are made to all producers supplying such handler with milk.

(f) Handlers may distribute the payments they are required to make to producers for milk received by them, on any uniform basis other than that specified above in this section, that is approved by the market administrator.

(g) Payments to the Seasonal-Adjustment Fund. (1) On or before the 15th day after the end of each delivery [fol. 20] period for April, May, and June, each handler, except handlers who have made payments to a cooperative association pursuant to the proviso in (a) of this section, shall pay to the market administrator for the account of the seasonal-adjustment fund an amount of money equal to $0.30 times the hundredweight of milk received from producers during the delivery period and cooperative associations which receive payments from handlers pursuant to the proviso in (a) of this section shall pay to the market administrator for the account of the seasonal-adjustment fund an amount of money equal to $0.30 times the hundredweight of milk delivered by the cooperative association to handlers during the delivery period for producers who have given authority to the cooperative association to receive payment for their milk.

(2) Seasonal-Adjustment Fund. The market administrator shall establish and maintain a separate fund known as the seasonal-adjustment fund into which he shall deposit all payments made by handlers or cooperative associations

pursuant to § 945.10 (g) (1) and out of which he shall make all payments pursuant to § 945.10 (g) (3): *Provided*, That payments due any handler or cooperative association shall be offset by payments due from such handler or cooperative association.

(3) Payments Out of the Seasonal-Adjustment Fund. (i) On or before the 12th day after the end of the delivery periods of September, October, and November, the market administrator shall compute a seasonal adjustment fund rate as follows: divide one-third of the aggregate amount paid to the seasonal-adjustment fund pursuant to § 945.10 (g) (1) by the total hundredweight of producer milk delivered during the delivery period involved (September, October, or November).

(ii) On or before the 15th day after the end of the delivery periods of September, October, and November, the market administrator shall pay out of the seasonal-adjustment fund to each cooperative association an amount equal to the rate computed pursuant to (i) of this paragraph times the hundredweight of milk delivered to handlers during the delivery period by such association for producers who have given authority to such cooperative association to receive payment for their milk, and to each handler an amount equal to the rate computed pursuant to (i) of this paragraph times the hundredweight of milk received during the delivery period from producers other than those producers for whom a cooperative association receives payments pursuant to the proviso in paragraph (a) of this section.

(*h*) Errors in Payment. Errors in making the payments prescribed in this section shall be corrected not later than the date for making payments next following the determination of such errors.

§ 945.11 Expense of administration and marketing services. (a) Payments by Handlers. As his pro rata share of the expense of the administration hereof, each handler shall pay to the market administrator on or before the 18th day after the end of each delivery period an amount equal to 2 cents per hundredweight with respect to all milk and cream received by him from all sources except other

handlers' producer milk plants, or produced by him, during such delivery period, or such lesser amount, the exact [fol. 21] amount to be determined by the market administrator subject to review by the Secretary. Each handler which is a cooperative association shall pay such pro-rata share of the expense of administration only on such milk and cream actually received at a producer milk plant operated by such cooperative association. If the market administrator designates an independent agency to determine the butterfat content of milk received by handlers from producers as permitted by § 945.10 (b), each handler shall pay to the market administrator an amount equal to one-half the cost of such tests of producer milk and the entire cost of such tests of emergency milk, the exact amount to be determined by the market administrator.

(b) Marketing Services. If the market administrator designates an independent agency to determine the butterfat content of milk received by handlers from producers, as permitted under § 945.10 (b), each handler shall deduct from his payments to each producer an amount equal to one-half the cost per test, the exact amount to be determined by the market administrator, and shall pay such deduction to the market administrator on or before the 18th day after the end of each delivery period. Such monies shall be used by the market administrator to pay the independent laboratory for the verification of weighing, sampling, and testing of milk received from producers.

(c) Suits by Market Administrator. The market administrator may maintain a suit in his own name against any handler for the collection of such handler's pro-rata share of expense as set forth in this section.

§ 945.12 Emergency milk committee. (a) At the application of handlers of more than 50 percent of the milk received from producers for sale in the marketing area, the Director of the Dairy Branch, Production and Marketing Administration, Department of Agriculture (hereinafter referred to as Director of Branch), may select a committee to be known as the "Emergency Milk Committee," all of whom may be selected from among the persons

nominated in accordance with the procedure established by the Director of Branch. The market administrator shall be a member of such committee and may act as chairman thereof.

(b) Duties. The Emergency Milk Committee may supervise the purchase and allocation of emergency milk and cream among handlers desiring to purchase such milk and cream through one or more importing agencies, and shall make rules and regulations subject to the approval of the Director of Branch, with respect to such allocation of milk and cream and the distribution of the cost thereof.

§ 945.13 Effective time, suspension, or termination. (a) Effective Time. The provisions hereof, or any amendment hereto, shall become effective at such time as the Secretary may declare and shall continue in force until suspended or terminated pursuant to (b) of this section.

(b) Suspension or Termination. The Secretary may suspend or terminate this amended order or any provision hereof whenever he finds that this amended order or any provision hereof obstructs or does not tend to effectuate the declared policy of the act. This amended order shall, in any event, terminate whenever the provisions of the act authorizing it cease to be in effect.

[fol. 22] (c) Continuing Power and Duty of the Market Administrator. (1) If, upon the suspension or termination of any or all provisions hereof, there are obligations arising hereunder, the final accrual or ascertainment of which requires further acts by any handler, by the market administrator, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such suspension or termination: *Provided,* That any such acts required to be performed by the market administrator shall, if the Secretary so directs, be performed by such other person, persons, or agency as the Secretary may designate.

(2) The market administrator, or such other person as the Secretary may designate, shall (i) continue in such capacity until removed by the Secretary; (ii) from time to time account for all receipts and disbursements, and

when so directed by the Secretary deliver all funds on hand, together with the books and records of the market administrator or such person, to such person as the Secretary shall direct; and (iii) if so directed by the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person full title to all funds, property, and claims vested in the market administrator or such person pursuant thereto.

(d) Liquidation after suspension or termination. Upon suspension or termination of any or all provisions hereof, the market administrator, or such person as the Secretary may designate, shall, if so directed by the Secretary, liquidate the business of the market administrator's office and dispose of all funds and property then in his possession or under his control, together with claims for any funds which are unpaid or owing at the time of such suspension or termination. Any funds collected pursuant to the provisions hereof, over and above the amounts necessary to meet outstanding obligations and the expenses necessarily incurred by the market administrator or such person in liquidating and distributing such funds, shall be distributed to the contributing handlers and producers in an equitable manner.

§ 945.14 Agents. The Secretary may, by designation in writing, name any officer or employee of the United States or name any bureau or division of the United States Department of Agriculture to act as his agent or representative in connection with any of the provisions hereof.

§ 945.15 Liability. The liability of handlers hereunder is several and not joint and no handler shall be liable for the default or any other handler.

Issued at Washington, D. C., this 26th day of October 1945, to be effective on and after the 3d day of November 1945.

(S.) Clinton P. Anderson, Secretary of Agriculture.

Approved: October 31, 1945.

(S.) Harry S. Truman.

(Here follows 1 Photolithograph, side folio 23.)



28A

EXHIBIT "B"
H F S with Petition - Feb. 23, 1951

United States of America

H F S
With Petition
FEB. 23, 1951

Department of Agriculture

February 15, 1951, 19

to Title 28, United States Code, Section 1733, I hereby

re are now in this Department the following-described documents:

ice of Proposed Rule Making - Consideration of Suspension of
ing Provisions of the Orders, as Amended, Regulating the
ling of Milk in the New York Metropolitan, Philadelphia,
sylvania, Washington, D. C., Greater Boston, Lowell-Lawrence,
Fall River, Massachusetts, Milk Marketing Areas, issued by
Secretary of Agriculture on January 3, 1947

ination of Order, as Amended, Regulating the Handling of Milk
e Washington, D. C., Marketing Area, issued by the Secretary
riculture on March 27, 1947, effective March 31, 1947

true rrect, and compared copies thereofare attached hereto.

By direction of the Secretary of Agriculture, and in witness whereof, the said copies are hereby authenticated, the seal of the Department of Agriculture is affixed hereto, and I have signed my name hereto on the day and year first above written.

Charles W. Bucy
Associate SOLICITOR

23

BLEED THROUGH POOR COPY

[fol. 24] United States Department of Agriculture

Production and Marketing Administration

New York Metropolitan, Philadelphia, Pennsylvania, Washington, D. C., Greater Boston, Lowell-Lawrence, and Fall River, Massachusetts, Milk Marketing Areas.

Notice of Proposed Rule Making

Consideration of Suspension of Pricing Provisions of the Orders, as Amended, Regulating the Handling of Milk in the New York Metropolitan, Philadelphia, Pennsylvania, Washington, D. C., Greater Boston, Lowell-Lawrence, and Fall River, Massachusetts, Milk Marketing Areas.

Notice is given that pursuant to the applicable provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 1940 ed. 601 *et seq.*), consideration is being given to the suspension of such of the class pricing provisions of Orders Nos. 27, 61, 45, 4, 34, and 47, as amended, regulating the handling of milk in the New York Metropolitan, Philadelphia, Pennsylvania, Washington, D. C., Greater Boston, Lowell-Lawrence, and Fall River, Massachusetts marketing areas, respectively, as may be necessary to reflect current economic conditions affecting the market supply and demand for milk and its products in the aforesaid marketing areas.

In accordance with the Administrative Procedure Act (Public Law 404, 79th Cong., 60 Stat. 237), all persons who desire to submit oral or written data, views, or argument with respect to the specific adjustment of prices for all classes of milk in the aforesaid marketing areas as may be necessary to reflect current economic conditions affecting the supply and demand for milk and its products, will be given an opportunity to do so at the Thomas Jefferson Auditorium, South Building, United States Department of Agriculture, Washington, D. C., beginning at 10 a. m. January 9, 1947.

Issued at Washington, D. C., this 3rd day of January 1947.

(S.) Clinton P. Anderson, Secretary of Agriculture.

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[fol. 25] Title 7—Agriculture

Chapter IX—Production and Marketing Administration
(Marketing Agreements and Orders)

Part 945—Milk in Washington, D. C., Marketing Area
Termination of Order, as Amended

It is provided in Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (48 Stat. 31, as amended; 7 U.S.C. 601 *et seq.*), hereinafter referred to as the "act," that the Secretary of Agriculture shall terminate, at the end of the then current marketing period, any order issued under the act whenever he finds that such termination is favored by the requisite majority of producers.

It Is Hereby Found That the termination of Order No. 45, as amended (Sections 945.1-945.15 inclusive), regulating the handling of milk in the Washington marketing area, hereinafter referred to as the "order," is favored by a majority of the producers who, during January 1947 (which is hereby determined to be a representative period), were engaged in the production of milk for sale within the Washington marketing area, and such majority, during such representative period, produced more than 50 percent of the volume of such commodity sold in the aforesaid milk marketing area.

[fol. 26] It Is Further Found and hereby determined that compliance with the notice and public rule making procedure requirements of the Administrative Procedure Act (Pub. Law 404, 79th Cong., 60 Stat. 237) is impracticable, unnecessary, and contrary to the public interest in that the time intervening between the date when the conditions necessitating the foregoing findings relating to the requisite producer approval, became apparent and the mandatory effective date of the termination of the order resulting therefrom is insufficient to permit such compliance.

It Is, Therefore, Ordered, That the said order, regulating the handling of milk in the Washington marketing area be, and the same hereby is, terminated effective at 11:59 p.m.,

e.s.t. March 31, 1947, subject, however, to the following conditions:

(1) That such termination of the said order shall not affect or waive any right, obligation, duty, or liability under the said order, or release or extinguish any violation of the said order, or affect or impair any right or remedy of the United States, the Secretary of Agriculture, or any other person with respect to any such violation which has arisen or occurred or which may arise or occur prior to the time that such termination becomes effective;

(2) That the provisions of § 945.13 of the said order, relating to proceedings subsequent to the termination of such order, shall remain in force and effect for the purpose of enabling the market administrator, designated as the [fol. 27] agency established for the administration of such order, to liquidate the affairs of the market administrator's office pursuant to the provisions of the said order;

(3) That the market administrator shall, in accordance with the applicable provisions of § 945.13, continue in such capacity and, from time to time, account for all funds, receipts, and disbursements; and

(4) That the said market administrator, continuing in such capacity, as provided in said § 945.13, shall have all of the powers and authority that may be necessary or proper in order to carry out the provisions thereof, and that such market administrator shall perform the duties specified therein.

The terms "Washington marketing area" and "market administrator" shall have the same meaning as set forth for the respective term in such order.

(48 Stat. 31, 670, 673; 49 Stat. 730; 50 Stat. 246; 7 U.S.C. 601 *et seq.*)

Issued at Washington, D.C., this 27 day of March 1947.

(S.) Clinton P. Anderson, Secretary of Agriculture.

EXHIBIT "C"

COMMONWEALTH OF VIRGINIA
STATE MILK COMMISSION
RICHMOND

ORDER AMENDING ORDER NO. 3, BY AMENDING SECTION 2, OF PARAGRAPH B, OF REGULATION NO. 1, AND REGULATION NO. 2, RETAIL AND WHOLESALE SELLING PRICES, OF THE RULES AND REGULATIONS FOR THE SUPERVISION AND CONTROL OF THE ARLINGTON-ALEXANDRIA MILK MARKET

EFFECTIVE 12:01 A.M., JANUARY 21, 1951, SECTION 2, OF PARAGRAPH B, OF REGULATION NO. 1, AND REGULATION NO. 2, RETAIL AND WHOLESALE SELLING PRICES, OF THE RULES AND REGULATIONS FOR THE SUPERVISION AND CONTROL OF THE ARLINGTON-ALEXANDRIA MILK MARKET, ARE HEREBY AMENDED AND REENACTED TO READ IN FULL AS FOLLOWS:

REGULATION NO. 1
MINIMUM PRICES TO BE PAID PRODUCERS FOR MILK
AND METHOD OF PAYMENT

B. MINIMUM PRICES TO BE PAID BY DISTRIBUTORS

2. CLASS I MILK.....$6.17 PER CWT. FOR MILK CONTAINING FOUR PER CENT (4%) BUTTERFAT.

REGULATION NO. 2
RETAIL AND WHOLESALE SELLING PRICES

THE FOLLOWING SCHEDULE OF MINIMUM PRICES SHALL PREVAIL IN THE ARLINGTON-ALEXANDRIA SALES AREA, EXCLUSIVE OF THE SALVAGE OR RECEMPTION VALUE OF ANY CONTAINER IN WHICH ANY MILK, AND/OR CREAM OR OTHER PRODUCT LISTED HEREIN IS DELIVERED TO A PURCHASER.

	RETAIL	WHOLESALE
A. MILK, CULTURED WHOLEMILK, HOMOGENIZED MILK, 3.25-4.25% BUTTERFAT AND CULTURED BUTTERMILK CONTAINING MORE THAN 1.5% BUTTERFAT		
GALLONS - BULK		.77
QUARTS - SINGLE QUART DELIVERY	.22½	.20
*QUARTS - THREE-QUART DELIVERY	.21½	
*QUARTS - SIX-QUART DELIVERY	.20	
PINTS	.13	.11½
HALF-PINTS	.07½	.06½
B. MILK, CULTURED WHOLEMILK, HOMOGENIZED MILK, 3.25-4.25% BUTTERFAT, AND CULTURED BUTTERMILK CONTAINING MORE THAN 1.5% BUTTERFAT (SOLD THROUGH STORES)		
HALF-GALLONS-DELIVERED IN TWO-QUART CONTAINERS	.41	
QUARTS	.20½	
C. MILK 4.26-5.5% BUTTERFAT - INCLUDING JERSEY AND GUERNSEY MILK		
GALLONS - BULK		.85
QUARTS - SINGLE QUART DELIVERY	.24½	.22½
*QUARTS - THREE-QUART DELIVERY	.23½	
*QUARTS - SIX-QUART DELIVERY	.22½	
PINTS	.14	.12½
HALF-PINTS	.073/4	.07½
D. MILK 4.26-5.5% BUTTERFAT - INCLUDING JERSEY AND GUERNSEY MILK (SOLD THROUGH STORES)		
HALF-GALLONS-DELIVERED IN TWO-QUART CONTAINERS	.45	
QUARTS	.22½	

	RETAIL	WHOLESALE
E. VITAMIN "D" HOMOGENIZED MILK 3.25-4.25% BUTTERFAT		
GALLONS - BULK		.77
QUARTS - SINGLE QUART DELIVERY	.23½	.21
*QUARTS - THREE-QUART DELIVERY	.22½	
*QUARTS - SIX-QUART DELIVERY	.21½	
PINTS		.12
HALF-PINTS		.06½
F. VITAMIN "D" HOMOGENIZED MILK 3.25-4.25% BUTTERFAT (SOLD THROUGH STORES)		
HALF-GALLONS-DELIVERED IN TWO-QUART CONTAINERS	.43	
QUARTS	.21½	
G. CULTURED SKIM MILK AND/OR BUTTERMILK (CONTAINING LESS THAN 1.5% BUTTERFAT)		
GALLONS - BULK		.54
QUARTS	.18	.16
PINTS		.09
HALF-PINTS		.05½
H. CULTURED SKIM MILK AND/OR BUTTERMILK (CONTAINING LESS THAN 1.5% BUTTERFAT) (SOLD THROUGH STORES)		
HALF-GALLONS-DELIVERED IN TWO-QUART CONTAINERS	.32	
QUARTS	.16	
I. CHOCOLATE OR OTHER FLAVORED MILKS OR DRINKS (TO CONTAIN NOT LESS THAN 1% BUTTERFAT)		
GALLONS - BULK		.77
QUARTS - SINGLE QUART DELIVERY	.22½	.20
*QUARTS - THREE-QUART DELIVERY	.21½	
*QUARTS - SIX-QUART DELIVERY	.20	
PINTS	.13	.11½
HALF-PINTS	.07½	.06½
J. CHOCOLATE OR OTHER FLAVORED MILKS OR DRINKS (TO CONTAIN NOT LESS THAN 1% BUTTERFAT) (SOLD THROUGH STORES)		
HALF-GALLONS-DELIVERED IN TWO-QUART CONTAINERS	.41	
QUARTS	.20½	
K. CREAM 18-22% BUTTERFAT (SWEET OR SOUR)		
GALLONS - BULK		$2.60
QUARTS	.71	.65
PINTS	.40	.35
HALF-PINTS	.22	.19
L. CREAM 33-38% BUTTERFAT (SWEET OR SOUR)		
GALLONS - BULK		$5.20
QUARTS	$1.38	1.30
PINTS	.78	.70
HALF-PINTS	.42	.37
M. HALF AND HALF 11-13% BUTTERFAT		
GALLONS - BULK		$1.69
QUARTS	.47	.43
PINTS	.27	.23
HALF-PINTS	.15	.13

*SEE PARAGRAPH N

N. THE QUANTITY PRICES PRESCRIBED IN PARAGRAPHS A, C, E AND I, OF THIS REGULATION FOR THE THREE OR SIX QUART DELIVERIES, SHALL NOT APPLY EXCEPT WHERE SUCH THREE OR SIX QUART PURCHASES ARE EQUIVALENT TO THREE OR SIX QUARTS PER DAY FOR A DELIVERY PERIOD OF NOT LESS THAN 30 DAYS.

O. THE SCHEDULES OF PRICES OF MILK "SOLD THROUGH STORES" CONTAINED IN PARAGRAPHS B, D, F, H AND ., OF THIS REGULATION, SHALL APPLY ONLY TO SALES OF MILK MADE TO AND BY STORES, HAVING A MERCHANT'S LICENSE, WHICH SELL MILK, IN THE ORIGINAL CONTAINERS, TO BE CONSUMED EITHER ON OR OFF THE PREMISES AND TO LICENSED DISTRIBUTORS OF MILK MAKING RETAIL SALES IN THE SALES ROOM OF THEIR DISTRIBUTING PLANT.

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MADE, ADOPTED AND POSTED FOR INSPECTION, AS HEREIN AMENDED, IN THE MAIN OFFICE OF THE COMMISSION, AND A CERTIFIED COPY THEREOF, ORDERED TO BE FILED, IN THE OFFICE OF THE COMMISSIONER OF AGRICULTURE, PURSUANT TO AUTHORITY VESTED IN THE COMMISSION, BY SECTION 3, OF THE MILK AND CREAM ACT, CHAPTER 357, ACTS OF ASSEMBLY, 1934, PAGE 558, AS AMENDED, THIS SEVENTEENTH DAY OF JANUARY 1951.

STATE MILK COMMISSION

E. L. HILLNER, COMMISSIONER

V. P. RANDOLPH, JR., COMMISSIONER

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EXHIBIT "C"

COMMONWEALTH OF VIRGINIA
STATE MILK COMMISSION
RICHMOND

RULES AND REGULATIONS FOR THE SUPERVISION AND CONTROL OF THE ARLINGTON-ALEXANDRIA MARKET

EFFECTIVE APRIL 1, 1936

REVISED APRIL 1, 1950

COMMONWEALTH OF VIRGINIA
STATE MILK COMMISSION
RICHMOND

RULES AND REGULATIONS FOR THE SUPERVISION AND CONTROL OF THE ARLINGTON-ALEXANDRIA MILK MARKET

(AUTHORITY-MILK AND CREAM ACT, CHAPTER 357, ACTS OF ASSEMBLY, 1934, AS AMENDED)

EFFECTIVE 12:01 A.M., APRIL 1, 1950, AND POSTED IN THE OFFICE OF THE COMMISSION AND A CERTIFIED COPY FILED IN THE OFFICE OF THE COMMISSIONER OF AGRICULTURE IN RICHMOND.

THESE REGULATIONS AMEND AND REENACT THE REGULATIONS HERETOFORE ADOPTED.

DEFINITIONS

AS USED IN THE RULES AND REGULATIONS, UNLESS OTHERWISE STATED, AND UNLESS THE SUBJECT CLEARLY INDICATES OTHERWISE.

"COMMISSION", "DISTRIBUTOR", "PRODUCER", "PRODUCER-DISTRIBUTOR", "CONSUMER", "LICENSEE", "MILK", "SUBSIDIARY", "AFFILIATE", "BOARDS", "BOOKS", "RECORDS", "HEALTH AUTHORITIES" AND "SANITARY REGULATIONS" ARE CLEARLY DEFINED IN THE MILK AND CREAM ACT, CHAPTER 357, ACTS OF ASSEMBLY, SESSION 1934, AS AMENDED.

"MILK" MEANS MILK AS DEFINED BY LAW, INCLUDING LOCAL ORDINANCES APPLICABLE IN THE SALES AREA.

"BREED MILK" MEANS MILK PRODUCED BY A HERD CONSISTING OF THE REGISTERED CATTLE AND/OR GRADE CATTLE OF THE BREED MILK ADVERTISED. ALL THE CATTLE MUST BEAR THE COLOR AND GENERAL CONFORMATION OF THE REGISTERED CATTLE OF THAT BREED.

"NEW PRODUCER" MEANS ONE WHO SECURES A PERMIT FROM THE HEALTH DEPARTMENT AS REQUIRED BY STATE OR LOCAL ORDINANCES ON THIS MARKET, AND HAS ALSO MADE APPLICATION TO THE LOCAL MILK BOARD AND HAS SECURED PERMISSION FROM THE COMMISSION TO SELL HIS MILK AND/OR CREAM WITHIN THE SALES AREA AFTER THE EFFECTIVE DATE OF THESE REGULATIONS.

"DELIVERY PERIOD" MEANS THE CALENDAR MONTH.

"BASE" MEANS THE ESTABLISHED QUANTITY OF MILK AND/OR CREAM SET UP FOR EACH PRODUCER ON AN EQUITABLE BASIS WITH ALL OTHER PRODUCERS FOR APPORTIONING FLUID MILK AND FLUID CREAM SALES AMONG THE PRODUCERS.

"ARLINGTON-ALEXANDRIA SALES AREA" MEANS THE TERRITORY INCLUDED WITHIN THE FOLLOWING BOUNDARIES, AND OTHER AREAS SPECIFIED HEREIN:

BEGINNING AT THE JUNCTION OF THE WESTERLY BOUNDARY OF THE FAIRFAX COUNTY LINE AND THE POTOMAC RIVER; THENCE SOUTHWESTERLY ALONG THE SAID COUNTY LINE TO ITS JUNCTION WITH HIGHWAY 50; THENCE SOUTHEASTERLY ON HIGHWAY 50 TO ITS JUNCTION WITH ROAD 656; THENCE SOUTHERLY ON ROAD 656 TO ITS JUNCTION WITH HIGHWAY 29; THENCE FROM THIS POINT IN A STRAIGHT LINE SOUTHEASTERLY TO THE JUNCTION OF ROADS 655 AND 620; THENCE EASTERLY ON ROAD 620 TO ITS JUNCTION WITH HIGHWAY 123; THENCE SOUTHERLY ON HIGHWAY 123 TO ROAD 636; THENCE FROM THIS POINT IN A STRAIGHT LINE SOUTHWESTERLY FROM THE JUNCTION OF ROAD 636 AND HIGHWAY 123 TO THE JUNCTION OF ROADS 641 AND 642 IN PRINCE WILLIAM COUNTY; THENCE SOUTHEASTERLY ALONG ROAD 642 TO ROAD 640; THENCE NORTHEASTERLY ALONG ROAD 640 TO ROAD 639; THENCE EASTERLY ALONG ROAD 639 TO HIGHWAY 123; THENCE SOUTHEASTERLY ALONG HIGHWAY 123 TO HIGHWAY 1; THENCE CROSS HIGHWAY 1 AND CONTINUE SOUTHEASTERLY ALONG ROAD 637 TO DAWSON BEACH; THENCE IN A STRAIGHT LINE DUE EAST TO THE POTOMAC RIVER; THENCE UP SAID RIVER TO ITS JUNCTION WITH THE WESTERN BOUNDARY OF THE FAIRFAX COUNTY LINE, THE POINT OF BEGINNING.

WHEREVER ROAD OR HIGHWAY NUMBERS ARE GIVEN AS BOUNDARY LINES IN THE ABOVE PARAGRAPH, ALL AREAS WITHIN THREE HUNDRED YARDS OF SAID ROADS OR HIGHWAYS WILL BE CONSIDERED A PART OF THE "SALES AREA" OF THE ARLINGTON-ALEXANDRIA MILK MARKET.

"ARLINGTON-ALEXANDRIA PRODUCTION AREA" MEANS THE TERRITORY INCLUDED WITHIN THE FOLLOWING BOUNDARIES:

BEGINNING AT THE JUNCTION OF THE STAFFORD AND PRINCE WILLIAM COUNTY LINE AT THE POTOMAC RIVER; THENCE NORTHWESTERLY ALONG SAID LINE TO HIGHWAY 1; THENCE SOUTHERLY ALONG HIGHWAY 1 TO HIGHWAY 3; THENCE WESTERLY ALONG HIGHWAY 3 TO HIGHWAY 20; THENCE WESTERLY ALONG HIGHWAY 20 TO HIGHWAY 49; THENCE SOUTHERLY ALONG HIGHWAY 49 TO NORTH ANNA RIVER; THENCE WESTERLY ALONG SAID RIVER TO HIGHWAY 4; THENCE NORTHWESTERLY ALONG HIGHWAY 4 TO HIGHWAY 29; THENCE NORTHERLY ALONG HIGHWAY 29 TO HIGHWAY 16; THENCE NORTHERLY ALONG SAID HIGHWAY TO HIGHWAY 211; THENCE NORTHEASTERLY ALONG SAID HIGHWAY TO HIGHWAY 3; THENCE NORTHERLY ALONG SAID HIGHWAY TO COUNTY LINE OF WARREN AND

RAPPAHANNOCK; THENCE NORTHEASTERLY ALONG SAID LINE TO THE WARREN AND FAUQUIER COUNTY LINE; THENCE IN THE SAME DIRECTION TO CLARKE-FAUQUIER COUNTY LINE; THENCE IN THE SAME DIRECTION ALONG SAID LINE TO THE CLARKE-LOUDOUN COUNTY LINE; THENCE NORTHEASTERLY ALONG SAID LINE TO THE INTERSECTION OF THE WEST VIRGINIA AND VIRGINIA STATE LINE; THENCE NORTHERLY ALONG SAID STATE LINE TO THE POTOMAC RIVER; THENCE DOWN THE POTOMAC RIVER TO THE JUNCTION OF THE STAFFORD AND PRINCE WILLIAM COUNTY LINE, THE POINT OF BEGINNING.

PROVIDED, HOWEVER, THAT PRODUCERS, PRODUCER-DISTRIBUTORS, OR THEIR SUCESSORS, SHIPPING MILK TO THIS MARKET ON THE EFFECTIVE DATE OF THE FIRST REGULATIONS ESTABLISHED IN THIS MARKET, MAY CONTINUE SO TO DO, UNTIL THEY VOLUNTARILY DISCONTINUE SHIPPING TO THIS MARKET.

REGULATION NO. 1
MINIMUM PRICES TO BE PAID PRODUCERS FOR MILK AND METHOD OF PAYMENT

A. CLASSIFICATION OF MILK.

1. CLASS I MILK - ALL MILK, SKIM MILK, CREAM (EXCEPT CREAM GOING INTO HALF AND HALF) AND MILK PRODUCTS WHICH ARE DISPOSED OF FOR FLUID CONSUMPTION AS MILK, SKIM MILK, MILK DRINKS, BUTTERMILK, HALF AND HALF, AND ALL MILK NOT ACCOUNTED FOR IN CLASS II AND CLASS III, EXCEPT THAT MILK, SKIM MILK, MILK DRINKS, BUTTERMILK AND HALF AND HALF WHICH ARE SOLD ON RECOGNIZED FEDERAL STATE OR MUNICIPAL CONTRACT.

2. CLASS II MILK - ALL MILK, SKIM MILK, CREAM AND MILK PRODUCTS WHICH ARE USED IN THE MANUFACTURE OF, OR DISPOSED OF IN, COTTAGE CHEESE, POT CHEESE, OR BAKER'S CHEESE, EGGNOG, CREAM FOR FLUID CONSUMPTION (INCLUDING CREAM USED IN HALF AND HALF) AND ANY MILK RESULTING FROM PLANT LOSS OR GAIN PURSUANT TO REGULATION NO. 1, PARAGRAPH C, SECTION 6.

3. CLASS III MILK - ALL MILK, SKIM MILK, CREAM, AND MILK PRODUCTS USED IN A DISTRIBUTOR'S MILK PLANT AS, OR DISPOSED OF TO A PLANT ENGAGED IN THE WHOLESALE MANUFACTURE OF ICE CREAM AND SIMILAR FROZEN DAIRY PRODUCTS AND MIXES, THEREFORE, BUTTER, ROLLER OR SPRAY NON-FAT DRY MILK SOLIDS, CONDENSED MILK, CONDENSED SKIM MILK, OR CHEESE OTHER THAN COTTAGE, POT OR BAKER'S CHEESE, AND USED AS SUCH, AND ALL MILK, CREAM AND SKIM MILK SOLD TO BAKERIES TO BE USED IN THE MANUFACTURE OF BAKERY PRODUCTS, AND ANY MILK RESULTING FROM PLANT LOSS OR GAIN PURSUANT TO REGULATION NO. 1, PARAGRAPH C, SECTION 6.

B. MINIMUM PRICES TO BE PAID BY DISTRIBUTORS.

1. EACH DISTRIBUTOR SHALL PAY PRODUCERS OR ASSOCIATIONS OF PRODUCERS, IN THE MANNER SET FORTH IN PARAGRAPH F, OF THIS REGULATION, AND NOT LESS THAN THE PRICES PRESCRIBED IN THIS REGULATION.

2. CLASS I MILK - THE PRICE FOR CLASS I MILK SHALL BE $5.60 PER CWT.

3. CLASS II MILK - THE PRICE COMPUTED FOR CLASS III MILK.

4. CLASS III MILK - THE PRICE FOR CLASS III MILK SHALL BE THE SUM OF THE RESPECTIVE VALUES OF BUTTERFAT AND SKIM MILK CALCULATED AS FOLLOWS:

   (A) BUTTERFAT:

   ADD ALL WEEKLY QUOTATIONS (USING THE MID-POINT OF ANY WEEKLY RANGE AS ONE QUOTATION) PER 40-QUART CAN OF 40 PER CENT SWEET CREAM APPROVED FOR "PENNSYLVANIA" AND ALL SUCH QUOTATIONS FOR SWEET CREAM APPROVED FOR "PENNSYLVANIA, NEWARK, AND LOWER MERION TOWNSHIP" IN THE PHILADELPHIA, PENNSYLVANIA MARKET, AS REPORTED FOR EACH WEEK ENDING WITHIN THE MONTH BY THE UNITED STATES DEPARTMENT OF AGRICULTURE, DIVIDE BY THE NUMBER OF QUOTATIONS, SUBTRACT $2.00, DIVIDE BY 33.48, MULTIPLY BY 4.

   (B) SKIM MILK:

   THE WEIGHTED AVERAGE SELLING PRICE, WHOLESALE AT MANUFACTURERS' PLANTS, OF ALL SPRAY AND ROLLER DRIED NON-FAT MILK SOLIDS FOR HUMAN CONSUMPTION, AS PUBLISHED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE FOR THE PREVIOUS MONTH, SHALL BE USED IN DETERMINING THE SKIM VALUE AS FOLLOWS:

C.

Quotation Per Pound	Class III Skim Milk
$0.065 or below	$0.00
0.066 to 0.075	0.07½
0.076 to 0.085	.15
0.086 to 0.095	.22½
0.096 to 0.105	.30
0.106 to 0.115	.37½
0.116 to 0.125	.45
0.126 to 0.135	.52½
0.136 to 0.145	.60
0.146 to 0.155	.67½
0.156 to 0.165	.75
0.166 to 0.175	.82½
0.176 to 0.185	.90
0.186 to 0.195	.97½

5. Premiums - In making payments pursuant to Section 2, of this paragraph, distributors shall pay the applicable premium rates set forth in this section for each producer's deliveries on that quantity of milk received from each producer which represented such producer's proportionate share of all producer milk classified as Class I. The premium rates referred to in this section shall be determined from the following schedule with respect to the cattle scores and farm scores recorded for each producer by the respective health departments requiring permits to sell milk to distributors in the sales area:

Farm Score	With Cattle Score Under 95 (per cwt)	With Cattle Score 95 or Over, but under 98 (per cwt)	With Cattle Score 98, or Over (per cwt)
Under 80	$0.00	$0.00	$0.00
80.0 - 84.9	.00	.03	.09
85.0 - 89.9	.02	.08	.14
90.0 - 94.9	.08	.14	.20
95.0 - 97.9	.20	.26	.32
Over 97.9	.31	.37	.43

If more than one score has been recorded during any month, the simple average of the scores so recorded shall be used. Producers who are subject to Health Department Regulations which do not provide for cattle scores in their scoring system shall be considered as having a cattle score of 98 or over and the score given them by the Health Department shall be considered the farm score for the purpose of applying premiums under the above schedule.

Any distributor may make uniform payments to producers in addition to the minimum payments required by this section: Provided, that such additional payments, except payments made to producers supplying breed milk to distributors for premium sales, are made to all producers supplying such distributor with milk.

6. Butterfat Differential - In making payments to each producer pursuant to Sections 2, 3 and 4 of this Paragraph, each distributor shall add to the price not less than or subtract from the price not more than, as the case may be, for each one-tenth of one per cent of butterfat content above or below four per cent in milk received from such producer, six cents per hundredweight. The butterfat content of milk received from producers shall be determined by taking the average of not less than five separate butterfat tests made from fresh samples during each delivery period.

C. Computation of milk in each class.

For each delivery period the Secretary of the Local Board shall correct the mathematical errors the reports submitted by each distributor and compute from the corrected report the amount of Class I milk, Class II milk and Class III milk as follows:

1. Determine the total pounds of milk to be accounted for as follows:

Add into one sum:

(a) The total pounds of milk received from producer's and distributor's own farm production.

(b) The total pounds of milk, skim milk and cream received, and the total pounds of milk, skim milk and cream received in the form of other milk products, and

(c) THE MILK EQUIVALENT OF THE BUTTERFAT IN ANY PLANT GAIN DETERMINED PURSUANT TO SECTION 6, OF THIS PARAGRAPH.

2. DETERMINE THE TOTAL POUNDS OF BUTTERFAT TO BE ACCOUNTED FOR AS FOLLOWS:

(A) MULTIPLY BY ITS AVERAGE BUTTERFAT TEST THE WEIGHT OF THE MILK RECEIVED FROM PRODUCERS' AND DISTRIBUTORS' OWN FARM PRODUCTION,

(B) MULTIPLY BY ITS WEIGHTED AVERAGE BUTTERFAT TEST THE WEIGHT OF THE MILK, SKIM MILK, CREAM AND MILK PRODUCTS RECEIVED FROM ALL OTHER SOURCES,

(C) ADD THE RESULTING AMOUNTS INTO ONE SUM.

3. DETERMINE THE TOTAL POUNDS OF CLASS I MILK AS FOLLOWS:

(A) CONVERT TO POUNDS THE QUANTITY OF MILK, SKIM MILK, BUTTERMILK AND MILK DRINKS DISPOSED OF FOR FLUID CONSUMPTION, INCLUDING MILK USED IN HALF AND HALF,

(B) MULTIPLY THE WEIGHT OF THE PRODUCTS COMPUTED PURSUANT TO (A) OF THIS SECTION EACH BY ITS AVERAGE BUTTERFAT TEST, ADD TOGETHER THE RESULTING AMOUNTS, AND DIVIDE BY THE PRODUCER PLANT TEST; AND

(C) ADD TO THIS AMOUNT ANY AMOUNT BY WHICH THE SUM OF THE QUANTITIES COMPUTED PURSUANT TO (A) OF THIS SECTION, EXCEED THE AMOUNT COMPUTED PURSUANT TO (B) OF THIS SECTION.

4. DETERMINE THE TOTAL POUNDS OF CLASS II MILK AS FOLLOWS:

(A) MULTIPLY THE WEIGHT OF THE CREAM DISPOSED OF FOR FLUID CONSUMPTION INCLUDING CREAM USED IN HALF AND HALF AND THE COTTAGE, POT OR BAKER'S CHEESE EACH BY ITS AVERAGE BUTTERFAT TEST, ADD TOGETHER THE RESULTING AMOUNTS, AND DIVIDE BY THE PRODUCER PLANT TEST;

(B) ADD TO THIS AMOUNT ANY AMOUNT BY WHICH THE TOTAL PRODUCT POUNDS OF CREAM DISPOSED OF FOR CONSUMPTION AS FLUID CREAM AND THE POUNDS OF CREAM AND SKIM MILK DISPOSED OF IN COTTAGE, POT OR BAKER'S CHEESE EXCEEDS THE AMOUNT COMPUTED PURSUANT TO (A) OF THIS SECTION; AND

(C) SUBTRACT FROM THE AMOUNT COMPUTED PURSUANT TO (B) OF THIS SECTION, ANY AMOUNT BY WHICH THAT AMOUNT WHEN ADDED TO THE AMOUNT OF CLASS I MILK DETERMINED PURSUANT TO SECTION 3, OF THIS PARAGRAPH, EXCEEDS THE TOTAL POUNDS OF MILK RECEIVED COMPUTED PURSUANT TO SECTION 1, OF THIS PARAGRAPH.

5. DETERMINE THE TOTAL POUNDS OF CLASS III MILK AS FOLLOWS:

(A) MULTIPLY THE WEIGHT OF EACH OF THE PRODUCTS OF CLASS III MILK BY ITS AVERAGE BUTTERFAT TEST, ADD TOGETHER THE RESULTING AMOUNTS, AND DIVIDE BY THE PRODUCER PLANT TEST;

(B) ADD TO THIS AMOUNT ANY AMOUNT BY WHICH THE TOTAL PRODUCT POUNDS OF MILK, SKIM MILK AND CREAM DISPOSED OF IN CLASS III PRODUCTS EXCEEDS THE AMOUNT COMPUTED PURSUANT TO (A) OF THIS SECTION; AND

(C) SUBTRACT FROM THE AMOUNT COMPUTED PURSUANT TO (B) OF THIS SECTION, ANY AMOUNT BY WHICH THAT AMOUNT WHEN ADDED TO THE AMOUNT OF CLASS I MILK DETERMINED PURSUANT TO SECTION 3, OF THIS PARAGRAPH, IN CLASS II MILK DETERMINED PURSUANT TO SECTION 4, OF THIS PARAGRAPH, EXCEEDS THE TOTAL POUNDS OF MILK RECEIVED COMPUTED PURSUANT TO SECTION 1, OF THIS PARAGRAPH.

6. PLANT LOSS OR GAIN TO BE DETERMINED AND CLASSIFIED AS FOLLOWS:

(A) ADD TOGETHER THE POUNDS OF BUTTERFAT CONTAINED IN THE POUNDS OF CLASS I, CLASS II AND CLASS III MILK.

(B) IF THE TOTAL POUNDS OF BUTTERFAT ARRIVED AT PURSUANT TO (A) OF THIS SECTION IS GREATER THAN THE TOTAL POUNDS OF BUTTERFAT COMPUTED PURSUANT TO SECTION 2, OF THIS PARAGRAPH, THEN THE RESULTING BUTTERFAT GAIN SHALL BE DIVIDED BY THE PRODUCER PLANT TEST AND THE RESULTING AMOUNT BE ADDED TO PRODUCER RECEIPTS IN ACCORDANCE WITH (C) OF SECTION 1, OF THIS PARAGRAPH.

(C) IF THE TOTAL POUNDS OF BUTTERFAT ARRIVED AT PURSUANT TO (A) OF THIS SECTION IS LESS THAN THE TOTAL POUNDS OF BUTTERFAT COMPUTED PURSUANT TO SECTION 2, OF THIS PARAGRAPH, DIVIDE THE DIFFERENCE BY THE PRODUCER PLANT TEST, AND FIRST SUBTRACT THE RESULTING AMOUNT FROM THE LOWEST CLASS OR CLASSES ARRIVED AT PURSUANT TO SECTIONS 3, 4, AND 5 OF THIS PARAGRAPH.

(1) Add to the Class III pounds determined according to Section 5 and Section 6 (c), any amount not greater than 1⅛ of the milk equivalent of the pounds determined pursuant to Section 2, of this Paragraph, but in no event shall this amount be greater than the amount arrived at pursuant to Subsection (c) of this Section. In the event the amount determined pursuant to Subsection (c), of this Section, is in excess of 1⅛, then such excess shall be prorated and added to Classes I, II and III on a percentage basis of the fat contained in Classes I, II and III, as computed pursuant to Sections 3, 4, 5 and 6 (c), of this Paragraph.

Footnote: 1. For the purpose of computation in Regulation No. 1, the butterfat content of skim milk shall be determined by a laboratory test of the skim milk acceptable to both parties or by a computation of the fat contained in the ultimate product resulting from the manufacture of such skim milk as the case may be. Except that in the event no acceptable laboratory test has been made of either the skim milk or the finished product made from the skim milk then, and in that event, the skim milk shall be deemed to have a butterfat content of .02 per cent.

D. Allocation of Producer Milk.

1. Producer milk received by a distributor shall first be allocated to Class I but not to exceed the Class I pounds as determined, pursuant to Paragraph C, Section 3.

2. Producer milk received by a distributor in excess of such Class I utilization shall be allocated to Class II but not to exceed the Class II pounds as determined pursuant to Paragraph C, Section 4.

3. Producer milk received by a distributor in excess of Class I and Class II utilization shall be in Class III.

E. Responsibility of Distributors in Establishing the Classification of Milk.

In establishing the classification of any milk received at a distributor's plant, the burden rests upon the distributor who received the milk directly from producers to prove that it should not be classified as Class I.

F. Payment to Producers.

1. On or before the 15th. day after the end of each delivery period each distributor shall make payment for the total value of milk and/or cream received from producers during such delivery period according to classifications and prices as set forth in Paragraphs A and B, in the manner set forth, as follows:

(a) To each producer except as provided in (b) of this Section at not less than the prices announced in Paragraph B, of this Regulation.

(b) To a cooperative association for

(1) Milk, skim milk and cream which is caused to be delivered to a distributor from producers by a cooperative association and for which such cooperative association collects payment, a total amount equal to not less than the sum of the individual payments otherwise payable to such producers under (a) of this Section.

2. Other milk in each use classification, determined pursuant to (a) of this Paragraph, received by such distributor for the account of an association of producers, at not less than the class prices specified in Paragraph B, plus the weighted average premium and butterfat differentials set forth in Paragraph B, Sections 5 and 6, to producers by such distributors.

3. Errors in Payment - Errors in making the payments prescribed in this Paragraph shall be corrected not later than the date for making payments next following the determination of such errors.

G. Regulation No. 1, shall apply only to distributors located within the Arlington-Alexandria Area, who purchase milk and/or cream from producers or associations of producers.

REGULATION NO. 2
RETAIL AND WHOLESALE SELLING PRICES

THE FOLLOWING SCHEDULE OF MINIMUM PRICES SHALL PREVAIL IN THE ARLINGTON-ALEXANDRIA SALES AREA, EXCLUSIVE OF THE SALVAGE OR REDEMPTION VALUE OF ANY CONTAINER IN WHICH ANY MILK, AND/OR CREAM OR OTHER PRODUCT LISTED HEREIN IS DELIVERED TO A PURCHASER.

		Retail	Wholesale
A.	**Milk, Cultured Wholemilk, Homogenized Milk 3.25-4.25% butterfat, and Cultured Buttermilk containing more than 1.5% butterfat**		
	Gallons - bulk		.67
	Quarts - single quart delivery	.20½	.18
*	Quarts - three-quart delivery	.19½	.18
	Pints	.12	.10½
	Half-pints	.063/4	.053/4
B.	**Milk, Cultured Wholemilk, Homogenized Milk 3.25-4.25% butterfat, and Cultured Buttermilk containing more than 1.5% butterfat** (sold through stores)		
	Half-gallons - delivered in two-quart containers	.37	
	Quarts	.18½	
C.	**Milk 4.26-5.5% butterfat - including Jersey and Guernsey Milk**		
	Gallons - bulk		.77
	Quarts - single quart delivery	.22½	.20½
*	Quarts - three-quart delivery	.21½	.20½
	Pints	.13	.11½
	Half-pints	.07	.06½
D.	**Milk 4.26-5.5% butterfat - including Jersey and Guernsey Milk** (sold through stores)		
	Half-gallons - delivered in two-quart containers	.41	
	Quarts	.20½	
E.	**Vitamin "D" Homogenized Milk 3.25-4.25% butterfat**		
	Gallons - bulk		.67
	Quarts - single quart delivery	.21½	.19½
*	Quarts - three-quart delivery	.20½	.19½
	Pints		.11
	Half-pints		.053/4
F.	**Vitamin "D" Homogenized Milk 3.25-4.25% butterfat** (sold through stores)		
	Half-gallons - delivered in two-quart containers	.39	
	Quarts	.19½	
G.	**Cultured Skim Milk and/or Buttermilk (containing less than 1.5% butterfat)**		
	Gallons - bulk		.48
	Quarts	.16½	.14½
	Pints		.081/4
	Half-pints		.05
H.	**Cultured Skim Milk and/or Buttermilk** (sold through stores) **(containing less than 1.5% butterfat)**		
	Half-gallons - delivered in two-quart containers	.29	
	Quarts	.14½	

* See Paragraph N

	Retail	Wholesale
I. CHOCOLATE OR OTHER FLAVORED MILKS OR DRINKS (TO CONTAIN NOT LESS THAN 3% BUTTERFAT)		
GALLONS - BULK		.67
QUARTS	.20½	.18
PINTS	.12	.10½
HALF-PINTS	.063/4	.053/4
J. CHOCOLATE OR OTHER FLAVORED MILKS OR DRINKS (SOLD THROUGH STORES) (TO CONTAIN NOT LESS THAN 3% BUTTERFAT)		
HALF-GALLONS - DELIVERED IN TWO-QUART CONTAINERS	.37	
QUARTS	.18½	
K. CREAM 18-22% BUTTERFAT (SWEET OR SOUR)		
GALLONS - BULK		$2.40
QUARTS	.65	.60
PINTS	.37	.33
HALF-PINTS	.20	.18
L. CREAM 33-38% BUTTERFAT (SWEET OR SOUR)		
GALLONS - BULK		$4.64
QUARTS	$1.26	1.16
PINTS	.72	.64
HALF-PINTS	.39	.34
M. HALF AND HALF 11-13% BUTTERFAT		
GALLONS - BULK		$1.54
QUARTS	.43	.39
PINTS	.25	.22
HALF-PINTS	.14	.12

N. THE QUANTITY PRICES PRESCRIBED IN PARAGRAPHS A, C AND E, OF THIS REGULATION FOR THE THREE-QUART DELIVERIES, SHALL NOT APPLY EXCEPT WHERE SUCH THREE-QUART PURCHASES ARE EQUIVALENT TO THREE QUARTS PER DAY FOR A DELIVERY PERIOD OF NOT LESS THAN 7 DAYS.

O. THE SCHEDULES OF PRICES OF MILK "SOLD THROUGH STORES" CONTAINED IN PARAGRAPHS B, D, F, H AND J, OF THIS REGULATION, SHALL APPLY ONLY TO SALES OF MILK MADE TO AND BY STORES, HAVING A MERCHANT'S LICENSE, WHICH SELL THE MILK, IN THE ORIGINAL CONTAINERS, TO BE CONSUMED EITHER ON OR OFF THE PREMISES, AND TO LICENSED DISTRIBUTORS OF MILK MAKING RETAIL SALES IN THE SALES ROOM OF THEIR DISTRIBUTING PLANT.

REGULATION NO. 3
RULES OF FAIR PRACTICE

EACH DISTRIBUTOR IN THE ARLINGTON-ALEXANDRIA SALES AREA SHALL OBSERVE THE FOLLOWING RULES OF FAIR PRACTICE:

A. THE SALE OF ARTICLES UNDER REGULATION NO. 2, SHALL BE IN CONTAINERS OR BOTTLES OF THE SIZE SPECIFIED, AND NO MILK AND/OR CREAM CAN BE SOLD IN EXCESS OF OR BELOW THE BUTTERFAT CONTENT AS IS PROVIDED IN PARAGRAPHS A, B, C, D, E, F, G, H, I, J, K, L AND M OF REGULATION NO. 2.

B. THE RETAIL PRICES SHALL APPLY TO ALL SALES AND DELIVERIES TO CONSUMERS WHERE DELIVERIES ARE MADE EITHER IN PERSON OR AT THEIR RESIDENCES, EXCEPT IN MARKETS WHERE THE "AGRICULTURAL MARKETING ADMINISTRATION SCHOOL MILK PROGRAM" HAS BEEN ESTABLISHED, HALF-PINT BOTTLES OF MILK MAY BE SOLD AT THE AGRICULTURAL MARKETING ADMINISTRATION'S PRICE TO SCHOOL CHILDREN FOR CONSUMPTION ON THE PREMISES.

C. THE WHOLESALE PRICES LISTED IN REGULATION NO. 2, SHALL APPLY TO SALES AND DELIVERIES TO HOTELS, RESTAURANTS, STORES, HOSPITALS, SCHOOLS, LICENSED BOARDING HOUSES, AND OTHER ESTABLISHMENTS HAVING MERCHANT'S LICENSE, WHERE MILK IS RESOLD FOR CONSUMPTION EITHER ON OR OFF THE PREMISES.

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D. Each licensee, delivering milk in glass bottles, shall require and collect from each wholesale purchaser a deposit charge of not less than One Cent (1¢) on each bottle. Any person, firm, or corporation selling milk, delivered in glass bottles, to retail customers for consumption off the premises, except on home delivery made by licensed distributors of milk, shall charge not less than One Cent (1¢) on each bottle, which said deposit shall be refunded upon the return of such bottles.

E. Nothing in this Regulation shall be construed to prohibit a distributor from submitting bids asked for by any governing body of any municipality, county, state, or federal government, including relief agencies; charitable institutions; or any agency supported entirely by the above-mentioned governing bodies. Provided, however, that the producers must receive the established price for milk and/or cream sold on such bids, as set up under Regulation No. 1, governing the particular sales area in which such institutions and/or agencies may be operating.

F. No distributor, his officers, agents, or employees, shall engage in, permit or encourage any method or device in connection with the sale of milk and/or cream, whereby any milk and/or cream is sold or offered for sale at a price or prices less than those set up under Regulation No. 2, whether by discount, rebate, redeemable certificates or stamps, free service, gift or loan of any container having any salvage value, or any merchandise, or combination price for such milk and/or cream with its container or merchandise, or other commodity sold or offered for sale; or by credit beyond the usual course of business or other valuable consideration, whether moving from such distributor or otherwise, the result of which will be to reduce the net price to purchasers below the minimum prices hereby prescribed in Regulation No. 2.

G. Distributors are prohibited from indulging in any of the following practices:

1. Paying for advertising, directly or indirectly, displayed in any place of business of a milk customer, or on the premises of any milk customer or prospective milk customer, advertising milk or any other commodity sold or handled by a distributor, without first having obtained the written approval of the State Milk Commission or its duly authorized representative.

2. Joining with a milk customer in a radio program in which milk or other commodity of the distributor is advertised.

3. Providing a milk customer with any article of any character for use in handling milk or other commodity, or use of neon signs, either by sale, lease, gift or loan, except the placing of individual insulated containers for use by retail customers, which containers shall remain the property of the distributor.

4. Entering into a contract or agreement with any person, firm or corporation, by which the distributor agrees, or undertakes to distribute, or to assist in the distribution of any prize or premium to the customers of the distributor, or by way of an advertisement of the milk or any other commodity handled by the distributor.

5. Using branded crates, or bottles, for the purpose of bottling and distributing milk therein, having thereon the name of any other licensee, painted, etched, blown, or otherwise imprinted in or on such crates or bottles.

H. A producer-distributor, or distributor, may, however, advertise his product by giving a free sample of one bottle of milk to a prospective customer for one time only, within a period of six months. A customer, as heretofore-mentioned, is limited to one person in a single household, and/or the proprietor, the manager, or purchaser, in an establishment buying or selling milk.

I. No person, firm, or corporation, shall deliver at retail, to another in the Arlington-Alexandria Sales Area, milk sold to such other or purchased for such other, at less than the price fixed by Regulation No. 2, whether the milk is delivered to purchasers from a fixed place of business within said market area, or is delivered from vehicles operating on regular routes within said market area over the public roads and streets of the Arlington-Alexandria Sales Area, or over both said roads and streets.

J. No person, firm, or corporation, shall solicit or accept orders for the sale or delivery of milk at retail within the Arlington-Alexandria Sales Area to purchasers therein, where the net price at which the order is to be filled is less than that fixed by Regulation No. 2.

K. Producers and Associations of Producers are prohibited from indulging in the following practices:

1. Offering milk and/or cream for sale whether in person or through his or its representative, where such milk and/or cream is used for fluid consumption, or accepting a price therefor, which is less than the price established for fluid milk and/or cream in these Regulations.

L. Regulation for the control of the wholesale and retail milk delivery.

1. It shall be a violation of the Rules and Regulations for a licensee, his officer, agent, or employee, to make delivery of milk, cream or any dairy product covered by Regulation No. 2, by any means of transportation or conveyance, for retail sale more frequently than once within a forty-eight hour period, beginning at 12:01 A.M., of any day; provided, however, that when and where the day of regular retail delivery falls on Sunday, the regular scheduled Sunday delivery may be made on Saturday after 12:01 P.M.

2. It shall be a violation of these Rules and Regulations for a licensee, his officer, agent or employee to make delivery of milk, cream or any dairy product covered by Regulation No. 2, for wholesale sales, as defined by Regulation No. 3, Paragraph C, to any wholesale customer on Sunday or more often than once within a twenty-four hour period, beginning at 12:01 A.M., for the six other days of the week; provided, however, that seven day per week wholesale delivery may be made to the armed forces of the United States and to hospitals; and provided further, that when one day's delivery to any wholesale customer exceeds the capacity of a single vehicle, additional vehicle delivery may be made on the same day and considered as one delivery for that customer.

3. Milk, cream or any dairy product covered by Regulation No. 2, delivered to or within any industrial plant, shipyard, construction project, factory, or office building in quantities of five quarts or more (or its equivalent) in any one day shall, for the purpose of this Regulation, be deemed a wholesale delivery irrespective of whether the milk so delivered is actually sold at wholesale or retail.

4. No licensee, his officer, agent, or employee shall make delivery of milk, or any dairy product covered by Regulation No. 2, other than cream and half and half, for retail sales in one-half pint containers.

5. No licensee, his officer, agent, employee or any other person shall make special delivery by any means of transportation or conveyance of milk, cream or any dairy product covered by Regulation No. 2, for wholesale and retail sales.

6. No licensee, his officer, agent, employee, or any other person shall make to retail customers call-backs for any purpose, other than for collecting monies, within the forty-eight hour period, beginning at 12:01 A.M., in which delivery has been made; nor shall they make to wholesale customers call-backs for any purpose, other than for collecting monies, within the twenty-four hour period, beginning at 12:01 A.M., in which delivery has been made.

7. Each licensee, his officer, agent or employee shall charge a deposit of twenty-five cents (25¢) on all milk cases or crates delivered to wholesale purchasers. Deposits are redeemable upon return of the milk crates or cases.

8. Provided, however, the sale of milk, cream or other dairy products covered by Regulation No. 2, over the counter direct to the consumer for on premises consumption is exempt from the provisions of Section 4, Paragraph L.

REGULATION NO. 4
GRANTING AND REVOKING LICENSES

A. All licenses now issued shall remain in effect until surrendered or revoked by the Commission for failure to comply with the Rules and Regulations.

New applicants for a distributor's license must make application and receive a license before handling or selling milk and/or cream for fluid consumption. Applications shall be submitted on Form SMC-1, and mailed direct to the State Milk Commission, Richmond.

B. No license shall be granted to a person not now engaged in business as a milk distributor, except for the continuation of a now-existing business, and no license shall be granted to authorize the extension of an existing business, by the operation of an additional plant, or other new or additional facility, unless the Commission is satisfied that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed new business, or the extension of an existing business by the operation of an additional plant, or other new or additional facility, that the issuance of such license will not tend, in the opinion of the Commission to a destructive competition in the already adequately served market and that the issuance of such license is in the public interest.

C. The Commission may decline to grant a license, or may suspend, or revoke a license already granted, upon due notice to the licensee, or applicant and after a hearing where the Commission is convinced from the evidence, of the existence of any of the following reasons or causes:

1. That the applicant for a license, or the licensee has knowingly made false statement, or inaccurate report of a material fact, either to the Local Board or to the Commission.

2. That the applicant for a license, or the licensee is insolvent, or has made a general assignment for the benefit of creditors or that a money judgment has been secured against such applicant or licensee, upon which execution has been returned wholly or partly unsatisfied.

3. That the licensee has knowingly violated any one or more of these Regulations.

4. The sale of milk and/or cream by a distributor or a producer-distributor to anyone other than to a distributor or producer-distributor operating exclusively within the sales area, without the consent of the State Milk Commission, shall constitute a ground for the revocation of the license of a distributor or producer-distributor.

D. At least ten days' notice shall be served upon the applicant or licensee of the reason or cause for refusing to grant or renew a license, or before suspending or revoking a license in which notice shall be stated the time and place of the hearing and the reason therefor.

REGULATION NO. 5
RECORDS AND REPORTS OF DISTRIBUTORS AND PRODUCER-DISTRIBUTORS

A. Distributors and/or producer-distributors shall at all times keep such records as will enable the Commission, or its representative, to accurately determine the disposition of all milk and/or cream received from all sources, distributed and/or handled by him; the butterfat test thereof, and the date such tests are made of each producer's deliveries. These records must show the total receipts of all milk and/or cream from all sources. They must show the sales by units, the value of each group of units, showing both retail and wholesale sales, together with the butterfat test of each commodity sold, which record shall show daily transactions, summarized into a monthly total.

B. Each licensee shall furnish in detail to the Commission and/or to the Local Milk Board not later than the tenth day of each month completed Forms SMC-2 and 2A and such other reports that may be requested by the Commission and/or the Local Board. This information must be compiled from records of a permanent nature and these records shall be subject to audit and inspection by any authorized employee or agent of the Commission.

The information as reported by licensees on Form SMC-2A, shall be kept confidential and shall be subject to inspection only by the Chairman of the Local Milk Board, and the Secretary to the Board when so authorized by the Chairman thereof.

C. The Local Board shall furnish the Commission all the information as required on Form SMC-3, together with each Certificate of Deposit covering the amount shown on Form SMC-3, immediately after making a deposit in the designated State Depository.

REGULATION NO. 6
ASSESSMENTS

For the purpose of defraying the expenses of the State Milk Commission, there is hereby levied, and the Local Milk Board is hereby required to collect an assessment of One-half Cent (½¢) per cwt. on all milk and/or cream handled by distributors; and One-half Cent (½¢) per cwt. on all milk and/or cream sold by producers, which said One-half Cent (½¢), such distributors shall deduct from payments to be made to their producers and pay to the Milk Board.

Assessments for the expense of the Local Milk Board shall not exceed One Cent (1¢) per cwt. on all milk and/or cream handled by distributors, and One Cent (1¢) per cwt. on all milk and/or cream sold by producers.

EACH DISTRIBUTOR SHALL PAY TO THE MILK BOARD, ALL ASSESSMENTS LEVIED ON HIM, AND SHALL DEDUCT AND PAY TO THE MILK BOARD, ALL ASSESSMENTS LEVIED BOTH BY THE COMMISSION AND THE BOARD, ON EACH PRODUCER DELIVERING MILK TO HIM.

ALL ASSESSMENTS SHALL BE PAID NOT LATER THAN THE FIFTEENTH DAY OF EACH MONTH FOLLOWING THE PREVIOUS DELIVERY PERIOD, AND SHALL BE DEPOSITED IMMEDIATELY, IN THE DESIGNATED STATE DEPOSITORY TO THE TREASURER OF VIRGINIA, ON FORMS PROVIDED BY THE TREASURER.

ON ALL MILK SOLD BY ONE DISTRIBUTOR TO ANOTHER, COMMONLY CALLED "EXCHANGE MILK", THE FIRST DISTRIBUTOR SHALL BE RESPONSIBLE FOR THE ASSESSMENT.

FOR DETERMINING THE PROPER ASSESSMENT ON CREAM RECEIVED AS CREAM, CONVERT SUCH CREAM TO FOUR PER CENT (4%) MILK EQUIVALENT, IN ACCORDANCE WITH TABLE NO. 1, ATTACHED HERETO. ALL DISTRIBUTORS OPERATING IN CONTROLLED AREAS, SERVING CONTRACTS TO THE FEDERAL GOVERNMENT, OR ANY AGENCY THEREOF, AND MAKING DELIVERY THEREOF IN ANOTHER CONTROLLED AREA SHALL REPORT SUCH SALES AND PAY THE ASSESSMENT LEVIED THEREON IN THE AREA IN WHICH SUCH DELIVERY IS MADE.

REGULATION NO. 7
ELECTION OF LOCAL BOARD MEMBERS

IT SHALL BE THE DUTY OF THE CHAIRMAN OF THE LOCAL MILK BOARD TO CALL A MEETING WITHIN THIRTY DAYS AFTER JUNE FIRST OF EACH YEAR, TO HOLD AN ANNUAL ELECTION OF BOARD MEMBERS OF THE PRODUCER AND DISTRIBUTOR REPRESENTATIVES.

VOTING FOR THE RESPECTIVE MEMBERS OF THE LOCAL BOARD SHALL BE CONDUCTED ON THE BASIS OF VOLUME OF MILK AND/OR CREAM COMPUTED TO FOUR PER CENT (4%) MILK EQUIVALENT, PRODUCED OR DISTRIBUTED. PRODUCERS SHALL VOTE FOR PRODUCER REPRESENTATIVES ONLY; DISTRIBUTORS SHALL VOTE FOR DISTRIBUTOR REPRESENTATIVES ONLY; AND PRODUCER-DISTRIBUTORS SHALL VOTE FOR PRODUCER-DISTRIBUTOR REPRESENTATIVES ONLY. IN THE EVENT PRODUCER-DISTRIBUTORS ARE NOT ENTITLED TO A REPRESENTATIVE ON THE LOCAL BOARD, THEY SHALL VOTE THEIR PRODUCTION VOLUME FOR PRODUCER REPRESENTATIVES AND THEIR DISTRIBUTION VOLUME FOR DISTRIBUTOR REPRESENTATIVES.

REGULATION NO. 8
EXEMPTION

THE PROVISIONS OF THESE REGULATIONS SHALL NOT BE CONSTRUED AS APPLYING TO ANY PERSON KEEPING NOT MORE THAN THREE (3) COWS, NOTWITHSTANDING THE FACT HE SELLS SOME MILK, PROVIDED, HOWEVER, THAT ALL SUCH SALES ARE MADE OF MILK PRODUCED BY HIM AND THE MILK DELIVERED ON HIS PREMISES, DIRECTLY TO THE PURCHASER, IN CONTAINERS FURNISHED BY THE PURCHASER.

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MADE, ADOPTED AND POSTED FOR INSPECTION, AS HEREIN AMENDED, IN THE MAIN OFFICE OF THE COMMISSION, AND A CERTIFIED COPY THEREOF, ORDERED TO BE FILED, IN THE OFFICE OF THE COMMISSIONER OF AGRICULTURE, PURSUANT TO THE AUTHORITY VESTED IN THE COMMISSION, BY SECTION 3, OF THE MILK AND CREAM ACT, CHAPTER 357, ACTS OF ASSEMBLY, 1934, PAGE 558, AS AMENDED, THIS TWENTY-THIRD DAY OF MARCH 1950.

STATE MILK COMMISSION

CHAIRMAN

COMMISSIONER

COMMISSIONER

/s

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MARCH 23, 1950

NOTICE

GENERAL ORDER - NO. 8, PERTAINING TO ASSESSMENTS TO BE LEVIED AND COLLECTED, DOES NOT APPLY TO THE ARLINGTON-ALEXANDRIA MARKET AFTER THE DATE OF THESE REVISED REGULATIONS, TO BECOME EFFECTIVE APRIL 1, 1950.

STATE MILK COMMISSION

John W. Owen

JOHN W. OWEN, SECRETARY

/B

TABLE NO. 1

FROM 3.3 TO 5.2 B.F. CONTENT REQUIRED PER GALLON OF CREAM FROM 11% TO 42% B.F. CONTENT

POUNDS OF MILK REQUIRED PER GALLON OF CREAM

CREAM	B.F. LBS. PER GAL.	MILK PERCENT																			
		3.3	3.4	3.5	3.6	3.7	3.8	3.9	4.0	4.1	4.2	4.3	4.4	4.5	4.6	4.7	4.8	4.9	5.0	5.1	5.2
11	.942	28.55	27.71	26.91	26.17	25.46	24.79	24.15	23.55	22.98	22.43	21.91	21.41	20.93	20.48	20.04	19.63	19.22	18.84	18.47	18.12
12	1.027	31.12	30.21	29.34	28.53	27.76	27.03	26.33	25.68	25.05	24.45	23.88	23.34	22.82	22.33	21.85	21.40	20.96	20.54	20.14	19.77
13	1.112	33.70	32.71	31.77	30.89	30.05	29.26	28.51	27.80	27.12	26.48	25.86	25.27	24.71	24.17	23.66	23.17	22.69	22.24	21.80	21.38
14	1.197	36.27	35.21	34.20	33.25	32.35	31.50	30.69	29.92	29.20	28.50	27.84	27.20	26.60	26.02	25.47	24.94	24.43	23.94	23.47	23.02
15	1.282	38.85	37.71	36.63	35.61	34.65	33.74	32.87	32.05	31.27	30.52	29.81	29.14	28.49	27.87	27.28	26.71	26.16	25.64	25.14	24.65
16	1.367	41.42	40.21	39.06	37.97	36.95	35.97	35.05	34.18	33.34	32.55	31.79	31.07	30.38	29.72	29.09	28.48	27.90	27.34	26.80	26.29
17	1.451	43.97	42.68	41.46	40.31	39.22	38.18	37.21	36.28	35.39	34.55	33.74	32.98	32.24	31.54	30.87	30.23	29.61	29.02	28.45	27.90
18	1.535	46.52	45.15	43.86	42.64	41.49	40.39	39.36	38.38	37.44	36.55	35.70	34.89	34.11	33.37	32.66	31.98	31.32	30.70	30.10	29.52
19	1.619	49.06	47.62	46.26	44.97	43.76	42.61	41.51	40.48	39.49	38.55	37.65	36.80	35.98	35.20	34.45	33.73	33.04	32.38	31.75	31.13
20	1.702	51.58	50.06	48.63	47.28	46.00	44.79	43.64	42.55	41.51	40.52	39.58	38.68	37.82	37.00	36.21	35.46	34.73	34.04	33.37	32.73
21	1.786	54.12	52.53	51.03	49.61	48.27	47.00	45.79	44.65	43.56	42.52	41.53	40.59	39.69	38.83	38.00	37.21	36.44	35.72	35.02	34.35
22	1.869	56.64	54.97	53.40	51.92	50.51	49.18	47.92	46.72	45.59	44.50	43.47	42.48	41.53	40.63	39.77	38.94	38.14	37.38	36.65	35.94
30	2.529	76.64	74.38	72.26	70.25	68.35	66.55	64.85	63.22	61.68	60.21	58.81	57.48	56.20	54.98	53.81	52.69	51.61	50.58	49.59	48.63
31	2.612	79.15	76.82	74.63	72.56	70.59	68.74	66.97	65.30	63.71	62.19	60.74	59.36	58.04	56.78	55.57	54.42	53.31	52.24	51.22	50.23
32	2.694	81.64	79.24	76.97	74.83	72.81	70.89	69.08	67.35	65.71	64.14	62.65	61.23	59.87	58.57	57.32	56.13	54.98	53.86	52.82	51.81
33	2.776	84.12	81.65	79.31	77.11	75.03	73.05	71.17	69.40	67.71	66.10	64.56	63.09	61.69	60.35	59.06	57.83	56.65	55.52	54.43	53.38
34	2.858	86.61	84.06	81.66	79.38	77.24	75.21	73.28	71.45	69.71	68.05	66.47	64.95	63.51	62.13	60.81	59.54	58.33	57.16	56.04	54.96
35	2.940	89.09	86.47	84.00	81.67	79.46	77.37	75.38	73.50	71.71	70.00	68.37	66.82	65.33	63.91	62.55	61.25	60.00	58.80	57.65	56.54
36	3.022	91.58	88.88	86.34	83.94	81.68	79.53	77.49	75.55	73.71	71.95	70.28	68.69	67.16	65.70	64.30	62.96	61.67	60.44	59.25	58.12
37	3.104	94.06	91.29	88.69	86.22	83.89	81.68	79.59	77.60	75.71	73.90	72.19	70.55	68.98	67.48	66.04	64.67	63.35	62.08	60.86	59.69
38	3.185	96.52	93.66	91.00	88.47	86.08	83.82	81.67	79.62	77.68	75.83	74.07	72.38	70.78	69.24	67.77	66.36	65.00	63.70	62.45	61.25
39	3.267	99.00	96.09	93.34	90.75	88.30	85.97	83.77	81.68	79.68	77.79	75.98	74.25	72.60	71.02	69.51	68.06	66.67	65.34	64.06	62.83
40	3.348	101.45	98.47	95.66	93.00	90.49	88.11	85.85	83.70	81.66	79.71	77.86	76.09	74.40	72.78	71.23	69.75	68.33	66.96	65.65	64.38
41	3.429	103.91	100.85	97.97	95.25	92.68	90.24	87.92	85.73	83.63	81.64	79.74	77.93	76.20	74.54	72.96	71.44	69.98	68.58	67.24	65.94
42	3.510	106.33	103.24	100.29	97.50	94.86	92.37	90.00	87.75	85.61	83.57	81.63	79.77	78.00	76.30	74.68	73.13	71.63	70.80	68.82	67.50

EXAMPLE:

DETERMINING THE FACTOR FOR 4.05% MILK
42.55 LBS. 4% MILK EQUIVALENT TO ONE GALLON OF 20% CREAM
41.51 LBS. 4.1% MILK EQUIVALENT TO ONE GALLON OF 20% CREAM

1.04 LBS. OF MILK DIFFERENCE IN 4.0% AND 4.1%
DIVIDE 1.04 BY 10 WHICH EQUALS POINTS OF TENTHS
THIS GIVES .104 LBS. FOR EACH 1/100%
MULTIPLY .104 BY 5 = .520 TO BE SUBTRACTED
THEREFORE 42.55 - .520 = 42.03 LBS. OF MILK TESTING
4.05% REQUIRED IN ONE GALLON OF 20% CREAM

[fol. 45] IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

[Title omitted]

ANSWER—filed March 15, 1951

The answer of the State Milk Commission to a petition exhibited against it in the Circuit Court of the City of Richmond by the County Board of Arlington County, Virginia, and others.

For answer to said petition the said State Milk Commission, reserving all just exceptions to such Petition, answers and says:

1. The petition for appeal is made pursuant to Section 3-371 of the Code of Virginia and involves the Milk and Cream Act of 1934, as amended.

2. The respondent is not advised as to the allegations contained in paragraph 2 of the petition and neither denies nor affirms the facts set forth therein.

3. The respondent admits that by order, designated "Arlington-Alexandria Market-Order No. 4", the retail and wholesale price of milk and cream in Arlington County was increased, but neither denies nor affirms the other allegations set forth in paragraph 3 of the petition.

[fol. 46] 4. The respondent denies the allegations found in paragraph 4 of the petition and says that the aforesaid order was issued after a legal notice of public milk hearing was given. Answering further the respondent says that such notice was published in eleven newspapers having a circulation in the Arlington-Alexandria market and clearly brought in issue the matter of increasing milk and cream prices.

5. The respondent neither denies nor admits the allegations of paragraph 5 of the petition.

6. The respondent denies the allegations found in paragraph 6 of the petition. Answering further the respondent expressly denies that it prohibits shipments of milk from other states.

7. The respondent admits the allegations of paragraph 7 of the petition.

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8. The respondent admits the statement found in paragraph 8 of the petition.

9. The respondent denies each and every allegation and statement found in paragraph 9 of the petition. Answering further the respondent says that the order designated as the "Arlington-Alexandria Market-Order No. 4" is supported by the evidence produced at the hearing and by its finding of fact.

And now, having fully answered the petition, the respondent prays to be hence dismissed with its reasonable costs by it in this behalf expended.

State Milk Commission, By (S.) J. Lindsay Almond, Jr., Attorney General, Henry T. Wickham, Assistant Attorney General.

(File endorsement omitted.)

[fol. 47] Certificate of service (omitted in printing)

[fol. 48] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

Re: The County Board of Arlington County, Virginia, a body corporate; et als., v. State Milk Commission.

MEMORANDUM OPINION—filed September 26, 1951

Gentlemen:

After due consideration of the petition for appeal, the answer thereto, the record certified to the court by the State Milk Commission, the oral argument and memoranda submitted by counsel, the court is of opinion that the contention of the petitioners that the order of the commission designated as Arlington-Alexandria Market Order No. 4, increasing milk prices was unreasonable and capricious, because it was issued after notice and hearing which did not give actual notice or bring in issue the matter of increasing prices and that the issue presented by the producers and considered at the hearing was limited to the

question whether the seasonal reduction should occur, is without merit. The notice of the public milk hearing reads in part "* * * for the purpose of considering the entire price structure concerning the sale of milk and to consider an adjustment in any or all prices of the sale of milk for the following markets, who will be heard in the order listed, Arlington-Alexandria, Manassas, Fredericksburg * * *". The record discloses that said notice of hearing was duly published in eleven newspapers having circulation in the [fol. 49] milk area. As to the contention that the issue was limited to the question whether the seasonal reduction should occur, the court is of opinion that after having given the above required notice of hearing and having conducted said hearing the commission had authority to raise, lower or refuse to change the price of milk.

In regard to the second contention of the petitioners that the State Milk Commission is without authority or jurisdiction to fix the prices of milk moving directly in interstate commerce, attention is directed to Section 3-371 (3) of the Code of Virginia, 1950, which provides in part that in an appeal to this court from an order of the State Milk Commission, the case shall be heard upon the record certified to the court by the commission. The defendant by counsel contends that there is no evidence in the record that milk passes in interstate commerce and consequently there is no factual basis for a consideration of the question of interstate commerce by this court. As the record is presently constituted, the court is of opinion that it should not consider this question.

The above quoted section of the Code further provides "* * * but the court may, in proper cases, remand the record to the commission for the taking of such further testimony as was not available upon the hearing appealed from, or such other testimony as the court shall provide may be taken".

The court is of opinion that this is a proper case in which to remand the record to the commission in order to permit the petitioners to offer material and relevant testimony in regard to the question of milk moving in interstate commerce. In light of additional testimony given, the commission should give consideration as to whether or not

Arlington-Alexandria Market Order No. 4 should be amended or revised. The commission shall certify and file with the court such additional testimony and if said order is amended or revised same shall also be filed with this court.

Upon presentation of a proper decree, same will be entered.

Your very truly, Harold F. Snead, Judge.

s/s

[fol. 50] In the Circuit Court of the City of Richmond

[Title omitted]

Decree Remanding Cause—October 9, 1951

This cause came on this day to be heard upon the petition for appeal, the answer thereto, the record certified to the Court by the State Milk Commission, the memoranda submitted, and was argued by counsel.

Upon consideration whereof, it appearing to the Court that the notice preceding the Public Milk Hearing in the Arlington-Alexandria market area on January 11, 1951, was lawful and sufficient, it further appearing that the State Milk Commission had authority to raise, lower or refuse to change the price of milk in the Arlington-Alexandria market area, it further appearing that Arlington-Alexandria Market Order No. 4, increasing milk prices, was not unreasonable or capricious.

And it further appearing that the record is devoid of factual basis for a consideration of the question of interstate commerce as related to the Arlington-Alexandria market area, and that this is a proper case in which to remand the record to the State Milk Commission for the taking of material and relevant testimony in regard to the question of milk moving in interstate commerce as related to the Arlington-Alexandria market area.

It is, therefore, adjudged, ordered and decreed that the record be remanded to the State Milk Commission for the [fol. 51] taking of such additional testimony as offered by the petitioners, the defendant or any other interested party

relating to milk moving in interstate commerce in connection with the Arlington-Alexandria market area.

It is further adjudged, ordered and decreed that the State Milk Commission shall certify and file with the Court such additional testimony taken, and if said Order No. 4 be amended or revised, the same shall also be filed with this Court.

It is further adjudged, ordered and decreed that this cause be retained upon the docket with leave to the parties or either of them to make application to the Court for such other or further orders as are authorized by law.

Enter (S.) Harold F. Snead.

I ask for this: Thomas M. Miller, Assistant Attorney General, Attorney for Defendant.

Seen: (S.) Malcolm D. Miller, Attorney for Petitioners.

[fol. 52] BEFORE THE STATE MILK COMMISSION

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, ET ALS.,

vs.

STATE MILK COMMISSION, Richmond, Virginia

In Chancery B.-643

SUPPLEMENTAL RECORD—filed January 2, 1952

Hearing October 9, 1951.

Hearing October 10, 1951.

(File endorsement omitted.)

[fol. 53] EXHIBIT No. 1

BEFORE THE STATE MILK COMMISSION

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, VIRGINIA

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, a body corporate; and FLORENCE E. CANNON, Chairman, F. FREELAND CHEW, ALFRED E. FRISBIE, ROBERT W. COX, DANIEL A. DUGAN, Members of the County Board, Petitioners,

vs.

STATE MILK COMMISSION, Defendant

In Chancery B-643—STIPULATION

It is hereby stipulated and agreed by the petitioners and the defendant that, in accordance with the instructions and subsequent order of this Court in this suit remanding the record to the State Milk Commission for the taking of further testimony in regard to the question of milk moving in interstate commerce, the State Milk Commission will convene and take testimony on October 9, 1951, at 10:00 o'clock a. m., EST., at the George Mason Hotel, Alexandria, Virginia, in conjunction with the Public Milk Hearing, scheduled for the same date, which hearing and taking of testimony will be continued from day to day until completed. This stipulation will constitute notice of the hearing by the State Milk Commission for the taking of the testimony as directed by this Court.

This stipulation is entered into by counsel for petitioners with the understanding that representatives of distributors of milk in Arlington County, Virginia, which have plants in the District of Columbia, will be available for examination by petitioners' counsel at said hearing with respect to facts concerning movement of milk in interstate commerce.

The County Board of Arlington County Virginia, and the Members of the County Board, Individually, By Malcolm D. Miller, Counsel; State Milk Commission, By J. Lindsay Almond, Jr., Attorney General, Thomas M. Miller, Assistant Attorney General.

[fol. 54] **Exhibit No. 2**

Before the State Milk Commission

Commonwealth of Virginia

(Virginia Seal)

J. Lindsay Almond, Jr., Attorney General.
G. Stanley Clark, Kenneth C. Patty, D. Gardner Tyler, Jr., Walter E. Rogers, C. Champion Bowles, Henry T. Wickham, Frederick T. Gray, Assistants.

Office of the Attorney General

Richmond

October 8, 1951.

Honorable Virgil P. Randolph,
Member of State Milk Commission,
Richmond, Virginia.

In Re: County Board v. State Milk Commission—In Chancery B-643.

Dear Mr. Randolph:

In accordance with our conversation, I herewith deliver to you for the State Milk Commission a Stipulation forwarded to this office by Malcolm D. Miller, counsel for Petitioners.

I have affixed my signature to the Stipulation upon the condition that the Commission, in its discretion, may file or enter into a new Stipulation with counsel for the Petitioners after examining the conditions prior to the hearing on October 9, at Alexandria.

It is not contemplated that there will be any difficulty, as it appears that the counsel for Petitioners merely wants to be protected from going ahead with a hearing should there be no one there from Washington to discuss the Interstate Commerce phase.

Very truly yours, Thomas M. Miller, Assistant Attorney General.

M-p.

[fol. 55] **Exhibit 3**

Before Commonwealth of Virginia State Milk Commission

The County Board of Arlington

v.

State Milk Commission and In the Matter of Arlington-Alexandria and Manassas Markets, Price Structure

Minutes of Public Hearing

Statement of Mr. William Laehy on behalf of Maryland and Virginia Milk Producers Association, Alexandria, Virginia, October 9, 1951.

Before Mr. Virgil P. Randolph, Acting Chairman, Mr. E. L. Millner.

[fol. 56] Mr. Randolph: Ladies and Gentlemen, I am V. P. Randolph, Jr., of Richmond, the non-industry member of the State Milk Commission. This is Mr. E. L. Millner, the distributor member of the Milk Commission. Mr. Mark Turner, the Chairman and producer member, has disqualified himself because of a possible financial interest in the outcome of this hearing. This is in accordance with our policy, which has been approved by the Virginia Supreme Court of Appeals. Mr. John W. Owen, on my left, is Secretary. Mr. Fred Saunders is our Auditor.

If there are any preliminary motions before we go ahead, we will be glad to hear them at this time.

In a decision that we made as a result of a hearing last winter which ended up in the Circuit Court of the City of Richmond, involving the same question, the matter of interstate commerce was brought up, and the City Circuit Court remanded the matter for further evidence on the phase of interstate commerce. It might be that such evidence would be pertinent in this particular matter, too, and if that is so we will hear that and consider it in this meeting along with the previous hearing, but we will take that up at the conclusion of the hearing as to the pricing of milk.

Is that agreeable to you, Mr. Miller?

Mr. Miller: Yes, sir.

[fol. 57] Mr. Randolph: Before you begin, Mr. Leahy, I want the record to show that we are now taking up the feature of interstate commerce, which will apply not only to the case today, but also the proceeding that we had last January, which was appealed to the Richmond City Circuit Court, in which Mr. Malcolm Miller represented the petitioners, and in which case the Richmond City Circuit Court remanded the matter back to the State Milk Commission to have further evidence presented on that feature, so that either we or the City Circuit Court could take appropriate action on whatever evidence developed as to whether we were or were not interfering with interstate commerce.

Tomorrow, we shall take up the evidence on that, and because Mr. Leahy has to be away, we are now giving him the opportunity to make any remarks on that which he or his client wish him to make. The reason that we are "putting the cart before the horse" is because of the necessity of the case; that is, that we are listening to this legal argument before the facts are brought out, but I think that Mr. Leahy is perfectly familiar with the facts and there will not be any conflict, or substantial conflict, in the facts as he sees them and what will be brought out tomorrow.

Mr. Miller, have you any further statement to [fol. 58] make?

Mr. Miller: No. I presume that whatever I say will be said tomorrow. Is that correct?

Mr. Randolph: Yes, sir. It is just a question of time to give him an opportunity to be heard.

Mr. Leahy: Mr. Chairman, I take it that the Legislature in enacting the Milk and Cream Act had in mind carefully to avoid any conflict between the provisions of the Act which they were then about to enact into law and those of the Federal Constitution, and particularly that relating to interstate commerce, because under Section 14, entitled "Saving Clause" the Legislature provided:

> "No provision of this Act shall apply or be construed to apply to foreign or interstate commerce except insofar as the same may be effective pursuant to the

United States Constitution and to the laws of the United States enacted pursuant thereto."

In other words, the Legislature was well within its competency when it enacted the Milk and Cream Act and provided for fixing prices of milk to be sold in the State of Virginia. There can be no question but that the state [fol. 59] has that right within its police power. It had the right to impress a trust of public interest upon the production, distribution and sale of milk, and in doing so, and as one of the elements of that trust and that public interest, it had a right to set up a commission in order to determine upon investigation what the price of milk ought to be in the State of Virginia, because it specifically authorized the Commission to fix minimum wholesale and retail prices to be charged for milk in any market or markets and the prices to be charged for different grades of milk.

Now, there is nothing in the interstate commerce feature which distinguishes Arlington and Alexandria from any other market, because the Legislature never sought to control interstate commerce. It specifically exempted any pretense of control in the saving clause I have just read. It emphatically stated that no provision of the Act should apply to foreign or interstate commerce. Therefore, at no time has this Commission ever sought or assumed to fix prices of any milk in interstate commerce, but it has undoubtedly the right to fix the price of milk once the milk is sold in the State of Virginia, and that probably is as well illustrated in the case of *Highland Farms Dairy* vs. *Agnew,* which was decided as far back as 1937, as in any case that can be found. That was almost fifteen years [fol. 60] ago, when Judge Cardozo was on the bench and wrote the opinion, and you, Mr. Chairman, particularly, are familiar with the reputation and ability of that very noted Justice. The case went to the Supreme Court and practically every provision of the Act was assailed and attacked as unconstitutional, and more particularly that the Commission was without authority to deny a license to one High, and the Supreme Court sustained the Commission and in that opinion fixed the law.

Now, these were the facts in that case: The suit was for an injunction to restrain the members of the Commission (you gentlemen) from enforcing the statute and the regulations made thereunder.

Mr. Randolph: Was that a straight appeal to the Supreme Court from the District Court?

Mr. Leahy: Yes. It was an appeal by the plaintiffs from the decree of the District Court of the United States for the Eastern District of Virginia, dismissing the suit to enjoin enforcement of the state statute and regulations made thereunder for the fixing of minimum and maximum prices to be charged for milk and cream. I quote from the opinion:

> "The suit is for an injunction to restrain the members of the Commission from enforcing the statute or the regulations made thereunder. One of [fol. 61] the two plaintiffs (Highland Farms Dairy, Incorporated) which will be spoken of as 'Highland' has a creamery for the pasteurizing and treatment of milk at Washington in the District of Columbia. For that purpose it buys milk from farmers in Virginia and Maryland. Its entire output of bottled milk it sells to the other plaintiff, Luther W. High, who has retail stores in Virginia and elsewhere for the sale of ice-cream, milk, and other dairy products. A regulation adopted by the Commission on March 27, 1936, set up a market area, described as the Alexandria-Arlington Milk Market, within which High is engaged in business."

Now, High is the man who has retail stores in Virginia and elsewhere for the sale of milk, ice-cream and other dairy products.

> "Minimum prices prescribed for that area are in excess of the prices at which Highland had been selling to High and at which High had sold to the consumers. Each went on selling at the old prices. Neither made application for a license. In June, 1936, the Commission gave notice to High that it would proceed against him for an injunction if he refused compliance [fol. 62] with its orders. No proceedings against

Highland were begun or even threatened, the Commission taking the position that Highland was not subject to the prohibitions of the statute, its sales and purchases in Virginia being transactions in interstate commerce. In spite of this disclaimer, Highland joined with High in suing to enjoin the enforcement of the Act. A District Court of three judges, organized in accordance with Section 266 of the Judicial Code (28 U.S.C.A. Sec. 380), gave judgment for the defendants, with a comprehensive opinion to which little can be added. 16 Fed. Sup. 575. The case is here upon appeal.

"The power of a state to fix a minimum price for milk in order to save producers, and with them the consuming public, from price cutting so destructive as to endanger the supply, was affirmed by this court in Nebbia v. New York, 291 U.S. 502"——

May I pause there for a moment. Notice the emphasis on "minimum" and "producer."

"The power of a state to fix a minimum price for milk in order to save producers, and with them the consuming public, from price cutting so destructive as to endanger the supply * * *"

[fol. 63] Now, that is the argument that is made here today. In 1951 they want this price-cutting competition which they choose to color with that phrase which I mentioned before, "an open market, open competition."

May I say this, too, in connection with that statement: The reply argument was that this Act was passed in a time of depression, whereas, today we are in a time of inflation and, therefore, we should return to the price cutting "so destructive as to endanger the supply." The supply is the important thing.

This opinion was written in 1937, not in 1932, 1933, or 1934, in which the Nebbia case was re-affirmed and the philosophy of the Nebbia case maintained, and it has been maintained all the way down through.

"Appellants are not asking us to undo what was there done. They take the ground, however, that the

statute of Virginia is open to the objections that were inapplicable to the statute of New York. The present grounds of criticism will be considered one by one."

Now, first, they take up the point that the statute is invalid as an unlawful delegation of legislative authority, which was denied. Then they take up the second point:

"The statute is not invalid in its present applica- [fol. 64] tion by reason of a provision for the cancellation of the prices established for a market, if cancellation is requested by a majority of the producers and distributors in the area affected."

They denied that point. Then they came down to three:

"The statute does not lay a burden on interstate commerce. Argument to the contrary is built upon the definition of the word 'distributor' contained in Sec. 1. We learn from that section that distributors include 'persons where ever located or operating, whether within or without the Commonwealth of Virginia, who purchase, market, or handle milk for resale as fluid milk in the Commonwealth of Virginia.' This definition, we are told, takes in the plaintiff Highland, who buys milk and sells it in interstate commerce, and does so with the expectation that upon arrival in Virginia the milk will be resold. But Highland is not subject to the provisions of the Act, and so the Milk Commission has ruled. No matter what the definition of a distributor may be, sales are not affected by any restriction as to price unless made within the [fol. 65] boundaries of a designated market area. The sections quoted in the margin point fairly to that conclusion."

That is the section I have just read to the Commission.

"Highland in Washington may sell to High in Virginia, and High may buy from Highland, at any price they please. Not till the milk is resold in Virginia within a market area will the price minimum apply, and then only to the price to be charged on the resale.

> If there could be any doubt about this as a matter of construction, the doubt would be dispelled by the administrative practice and by the warning of the statute, expressed in Sec. 4, that operations in interstate commerce shall not be deemed to be affected. So also as to the requirement of a license expressed in Sec. 4. High needs a license to the extent that he sells at retail to consumers in Virginia. Highland does not need one, and the Commission is not asking it to apply for one, because its business as now conducted with persons in Virginia is interstate exclusively. Clumsy draftsmanship may have spread a fog about the section when [fol. 66] viewed in isolation or taken from its setting. The fog scatters when we recall the provisions of Sec. 14 and the administrative practice. Appellants' fears are visionary."

Further, on the argument that the statute was invalid for failure to prescribe the standards for granting licenses, or refusing them, that was denied, and the decree affirmed.

Mr. Randolph: Now, as I understand it, although we do not know until we hear from them, the claim is made or suggested that because the milk originates in Virginia and Maryland and is brought into Washington, is processed there by, say, Mr. Davison's concern, and then moves into Virginia, the milk has gone from one state to another to such an extent that when it comes to rest in Virginia we cannot regulate the retail price of that milk to the ultimate consumer. What have you to say about that?

Mr. Leahy: That is answered, Mr. Chairman, because I made the same argument in this case and the argument was not accepted.

> "One of the two plaintiffs (Highland Farms Dairy, Incorporated), which will be spoken of as 'Highland,' has a creamery for the pasteurizing and treatment of milk at Washington in the District of Columbia. For [fol. 67] that purpose it buys milk from farmers in Virginia and Maryland. Its entire output of bottled milk it sells to the other plaintiff, Luther W. High, who has retail stores in Virginia and elsewhere for the sale of ice-cream, milk, and other dairy products. A

regulation adopted by the Commission on March 27, 1936, set up a market area, described as the Arlington-Alexandria Milk Market, within which High is engaged in business. Minimum prices prescribed for that area are in excess of the prices at which Highland had been selling to High and at which High had sold to the consumers. Each went on selling at the old prices. Neither made application for a license. In June, 1936, the Commission gave notice to High that it would proceed against him for an injunction if he refused compliance with its orders."

And, as stated in the opinion, Highland in Washington could sell to High in Virginia and High could buy from Highland at any price they pleased.

"Not till the milk is resold in Virginia within a market area will the price minimum apply, and then only to the price to be charged on the resale. If there could be [fol. 68] any doubt about this as a matter of construction, the doubt would be dispelled by the administrative practice and by the warning of the statute, expressed in Sec. 14, that operations in interstate commerce shall not be deemed to be affected."

As soon as the milk got to High, although it was interstate milk produced in Maryland or Virginia and processed in the District of Columbia and then shipped over here to High—or let us substitute Safeway—shipped to Safeway and put on the shelf, that milk when sold must comply with the minimum price fixed by the Commission. We have an exact parallel to the case where Highland shipped to High here and the price applied on resale, but you did not attempt to fix what Highland should charge High, and that you did not do because you knew under Sec. 14 it was not under the jurisdiction of this Commission.

Mr. Randolph: We do not try to regulate any sales or transactions that occur outside of the Commonwealth.

Mr. Leahy: That is right. No one but your Commonwealth has authority to control that milk within the state. If it is within Virginia and the milk is here in the store, it is affected by whatever is done with that milk in the shape of

[fol. 69] selling the same. The District of Columbia, Maryland, West Virginia, or any other state has ceased to have any control over that—why? I say because control of that milk ceased when it was sold in the District of Columbia, Maryland, or West Virginia. Your control comes in when it comes over here from Maryland and then is presented for sale to Virginia inhabitants or to those within the market area which you have described and declared. That is where the police power of Virginia attaches to it. That is where it loses its interstate character. It becomes part and parcel of the general goods and chattels of the state, and when it is sold, then it must be sold in accordance with the regulations of the state in which it is then located and offered for sale.

Now, I do not know what the evidence may disclose tomorrow, but if it is within the picture as painted in *Highland* vs. *Agnew*, there isn't any doubt, there can't be any doubt about the authority of this Commission to fix the price at which the milk shall be sold, and this for the very reason, as stated in the Nebbia case and in this case, that this state had to take over that situation. There was a price cutting that was destructive. It did not destroy merely the price cutters and their immediate competitors: it went back of that and destroyed the suppliers of the milk, [fol. 70] and it became a public necessity of this area, the police power attached to it, and the right of a man to sell his milk at any price he chooses to sell it has to give way in the public interest and the public welfare, and the public welfare is advanced and protected by the production of the supply of milk far beyond the scene of the actual sale. Thus, we have the whole picture, the rationale and the philosophy of this milk regulation, and the police power of this great Commonwealth, and the whole case, it seems, has been decided within the framework of that decision. It is not a question of the movement of milk from the point of its production to the point of its distribution; it is the question presented, What is the character of that milk from a state or interstate standpoint at the time it is being offered for sale in the Commonwealth of Virginia? And that case, it strikes me, is decisive of the point. It is either interstate commerce or it is not, in accordance with what we

find to be the facts as the testimony develops them. But surely no sales can be transacted in the State of Virginia, where the transaction occurs in Virginia, where the sale is made in the State of Virginia, if it is not within that case.

Mr. Chairman, Mr. Whiteford loaned me that case. [fol. 71] He had it here. My office happens to be in the same building with him, and if you would like it overnight—because you will see him tomorrow—I will be only too happy to leave it with you and in your care tonight.

Mr. Randolph: Thank you, sir.

Mr. Leahy: Thank you, and thank you so much for this opportunity.

Mr. Randolph: Would you like to ask him any questions or say anything, Mr. Miller?

Mr. Miller: No. I think I will wait until tomorrow.

Mr. Randolph: It is your last chance, because he won't be here tomorrow.

Mr. Leahy: I think he will agree that is the law. That is the law and the facts distinguish it. Whether we agree with the law or not, we have to submit to it, unless we can develop facts which take it out from the law.

Mr. Randolph: I want the facts to come out, whatever they are.

In that event, I do not see anything further, and we shall adjourn until 9:30 tomorrow morning, at 815 15th Street, in Washington.

(Thereupon, the hearing was adjourned until the following morning at 9:30 o'clock at the office of Mr. [fol. 72] Roger Whiteford, Bowen Building, 815 15th Street, Washington, D. C.)

[fol. 72]

Attendance Register

Name	Address	Representing
E. W. Robertson	Warrenton	
G. R. Gaines	"	
Harry M. Birsner	Culpeper	
Jack Wall	"	
W. B. Harrison	Herndon	
Otto Phillips	Washington, D. C.	
J. L. Flinn	Catharpin, Va.	
Mattielee Casper	"	
Frank D. Cox	Manassas	
Francis M. Lewis	"	
Wilm. N. Kline	Fairfax	
Edwin Lynch	"	
A. R. Cullen	Manassas	
Gordon Welsh	Purcellville	
O. R. Hersch	Manassas	
E. T. Swink	Blacksburg	
Hawkins Bros.	Lynchburg	
R. S. Howard, Jr.	"	
J. H. McDevitt	Culpeper	
John W. Owen	Richmond	Sec'y. State Milk Commission
Lester W. Huff	Nokesville	
Clay Wood	"	

[fol. 73]

Wm. W. Cockerille	Herndon	
Sams & Marshall	Ashburn	
Clifford Tutwiler	Culpeper	
L. W. Kipps	Madison	
E. F. Willis	Culpeper	
James O. Yarger	Bristow	
Ted J. Shepherd	Nokesville	
Royal M. Minor	Elkwood	
E. M. Ufelder by R. G. Seeley	McLean	
L. S. Greene	Medland	
B. R. King	Warrenton	
W. C. Cole	Purcellville	
F. M. Cole	"	
Gerald J. Gloosman	Arlington	Arlington PUC
C. F. Clark	Culpeper	
E. W. Thompson	Woodbridge	
W. D. Troxell	Winston	
J. F. Hepner	Sterling	
C. P. Talbot	Springfield	
Owen R. Lewis	Arlington	
Paul Kincheloe	Burke	
E. L. Popkin	Alexandria	
J. D. Butzner, Jr.	Fredericksburg	
A. N. Smith	Purcellville, Va.	
J. V. Nichols	"	

[fol. 74]

H. A. Young		
Jeanne Rogers	Washington, D. C.	
Walker P. Burl	Catlett	
W. J. Andes	Bealeton	
A. J. Lee	Vienna	
C. J. McLain	Fredericksburg	

Name	Address	Representing
A. J. Andes	Bealeton	
Mark Turner	Herndon	Member, State Milk Commission
A. J. Richardson	Louisa	
H. D. Herst	McLean	
Florence C. Willis	Remington	
I. Fred Stine	Winchester	County Agent
R. S. Phifer	Lincoln	
J. F. Potts	Purcellville	
E. H. Potts	Round Hill	
C. R. Hope	Purcellville	
Clarence Hall	"	
George Da (illegible)		
C. H. Clemens	Leesburg	
C. C. Lynn		
Allen Bradley		
George Damm		
M. V. Davison		
S. H. R. Fred		
[fol. 75]		
Mrs. Raymond Edwards		
Roger Whiteford		
Bernard M. Wise		
E. C. Norman	Purcellville	
W. W. Turner		
E. W. Thompson, Jr.		
A. D. Williams	Winston	
Joe W. Ingram	Arlington	
D. M. Gray	Catlett	
B. C. Wilson	"	
Charles B. Gray, Jr.	Calverton	
J. L. Crittenden	"	
W. M. Cockerill	Purcellville	
W. F. Orricon	Lovettsville	
W. A. Thompson	Fairfax	
Harry M. Middleton	Herndon	
Charles R. Fenwick	Arlington	
M. H. Burchell	Alexandria	
Olive M. Hooker	Nokesville	
Wm. Wheeler	Manassas	
C. C. Lynn, Jr.	"	
Albert D. Carr	Waterford	
Harry S. Sommers	Paeonian Springs	
Ray E. Fields	Round Hill	
O. S. Kilby	Boston	
[fol. 76]		
W. J. Smith	Culpeper	
Paul Terrell	Forest	
G. L. Harlow	Culpeper	
James H. Broyles	Brandy	
William Shumate	Calverton	
Theodate P. Wilson	Purcellville	
W. W. Sanford, Jr.	Orange	
Dr. J. H. Iden	Manassas	
F. C. Day	Calverton	
B. F. Salsbury	Fairfax	
Hildegarde Herforth	Alexandria	
B. Higgs Lewis		
R. P. James	Purcellville	

Name	Address	Representing
S. B. Welsh	Leesburg	
Mrs. E. W. Howard	Washington, D. C.	Women's Clubs
A. Z. Patterson	Purcellville	
Patsy Patterson	"	
H. Ralph Fields	"	
E. O. Farmer	Lovettsville	
R. H. Rawlins	Washington, D. C.	
Harry M. Miller	Nokesville	
C. Carleton Walsh	Manassas	
Joseph E. Beard	Fairfax	
M. F. Beardsall		
Mrs. Birdsall		

[fol. 77]

W. D. Montgomery	Forest	
W. A. Hite	Culpeper	
G. F. Hill	Orange	
Mrs. G. K. Cowne	Nokesville	
Paul R. Marsh	Catlett	
Fred Johnson	Alexandria	
S. J. Green	Midland	
E. W. Stillwell	Washington, D. C.	
Leslie Bell	Nokesville	
E. T. Hilldrup	Fredericksburg	
Mrs. A. N. Smith	Purcellville	
L. C. James	"	
R. S. Oliver	Annandale	
Henry Fletcher	Manassas	
Edith Rogers		
Katharine B. Rogers		
Charles Benedum	Round Hill	
Robert B. James	" "	
C. F. Yates	Griffinsburg	
Edmund Burke	Boston	
E. P. Obenshain, Jr.	Forest	
J. Roy Brown	Culpeper	
Robert Apperson	Culpeper	
Golder Shumate	Calverton	
T. T. Curtis	Orange	

[fol. 78]

W. A. Williams	Orange	
C. E. Kincer	Elkwood	
G. K. Cowne	Nokesville	
Paul R. Irvin	"	
Colvin Bros.	"	
J. E. ———	Falls Church	
Robert H. Forman	Arcola	
T. C. Tutwiler	Culpeper	
E. M. Trevis	Catlett	
E. Forrest Lohr	Madison	
R. T. Jones	Aroda	
Hassell B. Leigh	Vienna	
J. C. Eller	Culpeper	
Mrs. T. J. Shepherd	Nokesville	
Richard E. Jones	Culpeper	
B. C. ———	Richmond	
Fred N. ———	Arlington	
C. K. Wilkerson	Alexandria	
T. J. Potts	Purcellville	
George C. Dickerson	Manassas	

Name	Address	Representing
D. Frank Slaughter	Mitchells	
Bernard Inskeep	Rapidan	
J. Louis Inskeep	Culpeper	
Clyde H. Weaver	"	
J. M. Hughes	Sterling	
[fols. 79–80]		
S. K. Andes	Remington	
Leonard Grove	Midland	
J. Maynard Magruder	Arlington	
Malcolm D. Miller	"	
Ben F. Morgan, Jr.	Blacksburg	
Guy J. Nageotte	"	
John O. Hardesty	Berryville	
G. Eldon Dovell	Reliance	
Harold D. Menken	Upperville	
Ada W. Menken	"	
Mr. & Mrs. E. D. Smith	Ashburn	
Louis Caporaletti	Manassas	
Cash Caporaletti	"	
R. L. Milner	Newport News	
J. W. Hughes	Alexandria	
Dr. O. S. Martin	Lynchburg	
J. D. Gunter	Evington	
Carl Kincheloe	Manassas	
W. D. McNair	Herndon	
F. G. Nancy, Jr.	"	
J. H. Ferguson	Washington, D. C.	
A. L. Thompson	"	
F. G. Young	Herndon	
Mrs. J. E. Carroll	Falmouth	
Mrs. G. W. Ritter	Herndon	
Mrs. R. I. Arrington	"	

[fol. 81] BEFORE THE STATE MILK COMMISSION

815 15th Street, Northwest, Washington, D.C.

Room 602, Bowen Building,

Wednesday, October 10, 1951

The above entitled matter came on for further hearing at 9:30 o'clock a.m., Commissioner V. P. Randolph, Jr., Acting Chairman, presiding.

Before:

V. P. Randolph, Jr., Commissioner (Acting Chairman), E. L. Millner, Commissioner.

Present:

Mark Turner, Chairman, John W. Owen, Secretary, F. J. Saunders, Jr., Auditor.

Appearances:

Malcolm P. Miller, Esq., for County Board of Arlington County.

Gerald Glassman, for Public Utilities Commission.

Roger J. Whiteford, Esq., and Bernard M. Wise, Esq., for Chesnut Farms Dairy.

Maurice V. Davison, Vice President, Chesnut Farms Dairy.

Robert H. Rawlins, Production Manager, Thompson's Dairy.

[fol. 82] Arthur B. Hanson, Esq., for Lucerne Milk Company.

E. W. Stillwell, Public Relations Counsel, Lucerne Milk Company.

M. H. Burchell, President, Alexandria Dairy Products Company.

William Blum, Esq., for Alexandria Dairy Products.

Bruce B. Derrick, Secretary-Treasurer, Maryland and Virginia Milk Producers Association.

[fol. 83] PROCEEDINGS

Commissioner Randolph: Gentlemen, this is a continuation of the hearing held yesterday at the George Mason Hotel in connection with a petition of certain distributors for the State Milk Commission to consider the price structure in the Arlington-Alexandria market and also the Manassas market, and also by agreement of Mr. Miller, counsel for the petitioner, and other interested parties, in the case of County Board of Arlington versus the State Milk Commission from the Circuit Court of the City of Richmond in which the said court remanded the matter to the State Milk Commission for further evidence with respect to interstate commerce.

The matter was determined to be held in Washington because most of the counsel and witnesses were in Washington and by agreement with Mr. Miller and others it was determined to hold this hearing here in the Bowen Building because of convenience of office space, and we do thank Mr. Whiteford very much for permitting us to use his office.

The purpose of this is to examine exactly how much of the milk in the Arlington-Alexandria market does flow in interstate commerce and whether or not in any way the regulations of the Milk Commission unduly hamper interstate commerce.

The City Circuit Court also requested the State Milk Commission to consider whether or not its regulations should be, in the light of the evidence to be produced, [fol. 84] amended in any way. For that reason we feel that not only evidence should be adduced showing the situation, but also arguments of counsel so that we could consider this last instruction of the City Circuit Court properly.

Mr. Miller concurs in the thought that perhaps the picture could best be presented, certainly as a beginning, by Mr. Whiteford, counsel for Chesnut Farms, to make a statement as to their operations, which would be considered as evidence, and then if further clarification of their operations is desired by any of the parties either he can be requested to amplify it or he can have one of the operating employees of the concern testify.

Is that agreeable, Mr. Miller?

Mr. Miller: Yes, I might say just by way of clarification that the decree of the court, of which I have a copy here, says, "such additional testimony as petitioners, defendants, or other interested parties relating to milk moving in interstate commerce in connection with the Arlington-Alexandria market area . . ."

The decree does not use the word "hamper" or the word "impede" or anything like that. It is just directed at finding out the facts as to the movement rather than as to whether there was any hampering or anything like that, but if anyone has any evidence of hampering, of course I think that would be relevant.

[fol. 85] Commissioner Randolph: We understood that part of your argument was that we do in some way or other hamper interstate commerce or otherwise control it improperly.

Mr. Miller: No. My contention goes a little further than that. My contention is that the Milk Commission does not have any jurisdiction over any direct movements in interstate commerce. The question of hampering is maybe part of it, but I do not think that the question of hampering is the principal question.

There are certain types of interstate commerce over which the State has no control. In other words, absolutely none. The courts are plain on that, and it is my contention that this is one of those types of movements, at least some of the movements are.

Commissioner Randolph: We feel that everybody should know exactly what your contentions are so that the proper evidence can be brought out to support that or to deny it, whatever the facts may be.

Could you start off, Mr. Whiteford, and make a statement which will be considered as part of the evidence by agreement of everybody as to the extent of your operations and then amplify it in any way that Mr. Miller or anybody else would want to have you.

Mr. Whiteford: Mr. Chairman and the Commission, my name is Roger J. Whiteford, practicing attorney in the [fol. 86] District of Columbia. I have represented the Chesnut Farms Dairy for approximately 30 years. In that

time I have been fairly familiar with its operation. I think that when I started to represent them they did not have any business in Virginia at all.

As of the present time, however, Chesnut Farms does do business in Virginia and has been doing so for, I would say, 25 years at least. At this time, according to the figures prepared by the accountant for the Virginia Commission taken from Chesnut Farms' own books, and in which we substantially concur, Chesnut Farms Dairy sold in the Arlington-Alexandria market 13.77 per cent of its total sales.

Chesnut Farms sold in Virginia 33.03 per cent of the total sales in this area. Chesnut Farms purchased from Virginia producers, that is, Virginia farms, 46.09 per cent of its total purchases. Chesnut Farms purchases milk from Virginia producers, from Maryland producers, and West Virginia producers.

Chesnut Farms purchased from Virginia in relation to the total Virginia purchases of distributors in this area 53.45 per cent, and the relationship of Virginia sales to Virginia purchases was 28.92 per cent.

It will thus be seen that a very substantial part of the business done in this area is done by Chesnut Farms and a very substantial part of its total purchases are made from [fol. 87] Virginia. It is true that Chesnut Farms brings that milk purchased in Virginia to its plant in the District of Columbia for processing. It has no processing or distributing plant in the area in question. Milk is processed in the plant in the District of Columbia and is then sent out by trucks to wholesale and retail routes in the Arlington-Alexandria market.

Chesnut Farms operates some 15 or 20 truck routes in this area. It sells the milk to many stores in this area, delivers to those stores, and sells it to them daily. When a truck goes to a wholesale outlet the transaction is made there because the quantities are varying in amounts that the stores and wholesale outlets purchase.

The driver does not know what that supply is or is to be each day until he gets there and makes the transaction with him there that day, and those collections are made daily. The store or the restaurant, as the case may be,

usually pays for it *in* daily to the driver on the spot. There are many doorstep deliveries. I do not know the number of thousands of houses to which Chesnut Farms delivers its products, but there are many of them, and they are constantly growing in amount.

Many of those purchases are made by the customer at the time the driver goes to the house. It is perfectly true that the majority of retail customers have a standing order to deliver a quart, two quarts, or a certain amount of [fol. 88] cream, but that is frequently changed, and the days of delivery of it are frequently changed.

A number of those customers do pay direct by check, sending their check into Washington to the Chesnut Farms Dairy. It is also true that many of them pay the drivers. In addition to that method of delivery and payment Chesnut Farms Dairy has a number of solicitors of business. They solicit the individual customer at his house and get him to agree to take milk from Chesnut Farms Dairy. They go to the wholesale establishments like restaurants, stores, and solicit business.

Chesnut Farms Dairy makes bids to supply milk to public institutions like schools and submits those bids in the area in question. I think at the present time Thompson's Dairy has the school contract, having been the successful bidder to deliver the milk for the contract period to public schools, having submitted the bid in the area and making the contract in the area and making the delivery in accordance with the contract to the schools daily or weekly as required.

Chesnut Farms Dairy aspired to do the same thing, but was not at this time the successful bidder, although it has at other times made delivery under bid contracts to these schools.

In addition to this Chesnut Farms frequently sends over additional trucks to supply trucks who go over with their load. If stores and restaurants buy more milk from the [fol. 89] truck driver this morning than he is able to supply, then a supplementary truck goes out from Chesnut Farms Dairy in response to a phone call to supply that truck driver, or various others, with additional supplies because he has oversold his capacity on that given day

by virtue of transactions that he has made over his load on that day.

For many years Chesnut Farms Dairy has been taxed in the State of Virginia by the State of Virginia on the basis of the business that it has done in this area. Many years ago we raised the question in behalf of Chesnut Farms Dairy as to whether we were doing business in Virginia. The State of Virginia Taxing authorities held that we were, and they have apportioned the volume of our business done in this area and taxed us accordingly.

I said that we did not own a plant or distributing station in the State of Virginia. We do own one vacant piece of real estate which I would not think, without anything else, constituted doing business, but I merely mention that we pay a real estate tax on that lot of $37.80.

We pay a franchise tax of $25. In the year 1950 we paid an income tax to the State of Virginia on business done in Virginia of $16,333. We paid for bus and store licenses $6,762.25 last year, and we have paid it for many years.

In further support of the contention that we do business in this area and do it in Virginia, it has been held [fol. 90] by the taxing authorities of the District of Columbia that they do not tax Chesnut Farms Dairy, that is, the District of Columbia, on the volume of business that we do in Virginia, nor do they tax it in the District of Columbia on the volume of business we do in Maryland.

The taxing authorities in the District have held that we are engaging in business in Virginia and therefore they exempt from our tax levy here in the District of Columbia the amount by which we do business in Virginia. That has been done by the taxing authorities here after full consideration of our tax liability to the District of Columbia.

It is rather an unusual position for a lawyer to be in to insist that his client is doing business in a jurisdiction where he has to pay taxes when if there were any possible way we could avoid that we would be very glad to do so. If Mr. Miller's contention is that we are engaged in interstate commerce and you gentlemen cannot under your Act fix the prices at which we must sell because it is a burden

on interstate commerce, I would suggest that he could by the same argument lift the $23,000 in taxes that we pay the State of Virginia for doing business over there.

We would indeed be very grateful if his contention would be supported.

Commissioner Randolph: I think that may very well be pertinent, but that is more or less argument rather than [fol. 91] a factual statement, and I thought that probably for a more orderly presentation we would confine ourselves entirely to just facts.

Mr. Whiteford: The amount of the tax is $23,000.

Commissioner Randolph: It is pertinent somewhere or other, so we will keep it in, but I thought possibly until we do get down to the argument, that sort of thing could be deferred for the time being.

Mr. Whiteford: I think that I have covered factually just how we do business over there and the volume of it, and if Mr. Miller has any question that he might wish to ask I would be glad to answer it. If I cannot, Mr. Maurice Davison, the Vice President of Chesnut Farms, is here to answer it.

Commissioner Randolph: I would like to ask possibly a few questions, but before that I would like to state that this table here that you referred to was prepared by our Mr. Saunders, offering March, 1951 for all the distributors in the metropolitan area who are licensed to do business in the Arlington-Alexandria market by the State Milk Commission.

These, you will notice, are percentages and not total volume. That under the Milk and Cream Act we consider as confidential business, which we cannot divulge. We did get those figures and we have prepared a table of them, but we are not going to make it of record unless the court so directs us, and we would then be glad of course to do so [fol. 92] because we feel it would be letting each distributor know what the other one is doing. We picked out March, 1951 as being as typical a month as we knew and which would reflect the true picture as far as it could as being typical of the average.

It was brought out yesterday, but I think it ought to be emphasized today for whatever it may be worth that all

your purchases of milk from producers are either at your plant in Washington, D. C., or your receiving station in Frederick, Maryland.

Mr. Whiteford: That is correct.

Commissioner Randolph: The sale is consummated in either of those two places. The milk is then processed and packaged either in glass or paper in Washington, D.C. in your plant there and then a certain portion of that milk, which shows up on this table and which is made part of the record, is then moved into Virginia and there sold either to retail or wholesale customers in Virginia, at which place the sales then occur; is that right?

Mr. Whiteford: That is correct. I would say that more than 95 per cent of it is processed in the District plant.

Commissioner Randolph: The milk that is purchased from the producers in Washington or in Frederick, which makes up your entire purchases, does not come under the jurisdiction of the Virginia State Milk Commission as far as you are advised?

Mr. Whiteford: I would say that the Virginia Milk [fol. 93] Commission has no jurisdiction over the price we pay for it either in the District of Columbia or in Maryland.

Commissioner Randolph: And the sale of milk to customers in Washington does not come under the Virginia State Milk Commission.

Mr. Whiteford: No, sir, it does not.

Commissioner Randolph: Has the practice been to consider the milk sold to customers either wholesale or retail, that is, to stores or to the doorstep customers, or to the schools, or otherwise, in Virginia to come under the regulations of the Virginia State Milk Commission?

Mr. Whiteford: Yes, sir, we have.

Commissioner Randolph: Do you want that amplified?

Mr. Miller: I would like to ask some questions.

Commissioner Randolph: Certainly.

Mr. Whiteford: I would like to say that apropos of the Chairman's suggestion that this was all in percentages so far as our sales in Virginia are concerned, if it would be of any additional help to the court or to counsel I would say that so far as our sales in Virginia being 13.77 per cent

of our total business, that that represents a very substantial amount dollar-wise, and while I do not wish to give the total dollar sales I would say you might well consider that it was at least a million dollars, in order to give some idea of the volume of business that we are doing there.

[fol. 94] Commissioner Randolph: You wish it were more?

Mr. Whiteford: Yes, sir, and it will be more eventually.

Commissioner Randolph: Mr. Rawlins, you represent Thompson's Dairy, do you not?

Mr. Rawlins: Yes, sir.

Commissioner Randolph: You have heard the statements just made by Mr. Whiteford. Do they represent the operations of your concern with the exception, of course, as to the percentages, which differences show up on the exhibits as prepared by Mr. Saunders?

Mr. Rawlins: They do. They are representative, yes, sir.

Commissioner Randolph: And they show the set-up of your plant?

Mr. Rawlins: They do.

Commissioner Randolph: And the method of doing business?

Mr. Rawlins: Yes, sir.

Commissioner Randolph: Do you have any receiving station?

Mr. Rawlins: We have no processing plants or receiving stations except the one located in the District.

Commissioner Randolph: So all of your purchases are in the District rather than in the District and Maryland?

[fol. 95] Mr. Rawlins: Yes, sir, all in the District.

Mr. Whiteford: Mr. Chairman, are you going to put this sheet in?

Mr. Miller: This percentage sheet is going to be part of the record.

Commissioner Randolph: We make that part of the record right now as an exhibit.

(The document referred to was received as Exhibit No. 5.)

Mr. Miller: I would like to ask some questions.

Could you tell me where the Chesnut Farms processing plant is located in the District of Columbia, that is, the street?

Mr. Davison: 2535 Pennsylvania Avenue, N. W.

Mr. Miller: And where is the Thompson's Dairy processing plant?

Mr. Rawlins: 2012 11th Street, N. W.

M r.Miller: Could you give me some sort of percentage or proportion roughly of your sales to the doorsteps in the Virginia area and what proportion to other outlets such as stores, schools, and so forth?

Mr. Whiteford: You mean dollar-wise that would be?

Mr. Miller: You can say 75 per cent or what it will be.

Mr. Davison: About 50 per cent is retail and 50 per [fol. 96] cent is wholesale.

Mr. Miller: About 50 per cent would be the door-step deliveries?

Mr. Davison: That is right.

Mr. Miller: About the same for Thompson's?

Mr. Rawlins: No, sir; I believe ours would be around 60 per cent to 65 per cent retail.

Mr. Miller: By retail you mean that I call door-step?

Mr. Rawlins: Yes, sir.

Mr. Miller: As to Chesnut Farms, I ride the bus a good many mornings past your plant, and I see these small home delivery trucks congregated around your plant on Pennsylvania Avenue. Is the milk being loaded there in those trucks that goes over to the Virginia door steps?

Mr. Whiteford: Yes.

Mr. Miller: And those trucks drive across the bridge, do they not?

Mr. Whiteford: I assume so.

Mr. Miller: And the store door deliveries are made from those trucks as they scatter out from the Virginia area?

Mr. Whiteford: They are bought, delivered, that is, sold and delivered from those trucks.

Mr. Miller: I will quarrel with your bigger conclusion as to where the sale was made. They deliver them.

Mr. Whiteford: They deliver them, that is right. I do

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[fol. 97] not want to have the admission that that is all the driver does.

Mr. Miller: Are Thompson's doorstep deliveries made in substantially the same way, that is, your delivery trucks load——

Mr. Rawlins: Load at our plant in Washington and drive across the bridge.

Mr. Miller: And scatter through the Arlington area and deliver to the doorstep?

Mr. Rawlins: They sell and deliver in Virginia.

Mr. Miller: Mr. Whiteford, what are the various methods by which business from the homes in Arlington that take this doorstep delivery come to you? How does the business come to you? What are the different ways?

Mr. Whiteford: It comes by reason of advertising, no doubt. It comes primarily, I think, by way of solicitation. We have solicitors, and our truck drivers are solicitors. Our swing men, our various men that we have, make a solicitation from door to door, and we advertise over in Virginia. You must remember that these truck drivers are paid on a commission basis, and they are better paid the more business they get, and they are really salesmen in their solicitation.

They will come to your store or your restaurant and urge you to buy exclusively perhaps. You must remember that these stores, many of them, handle milk of all the dis-[fol. 98] tributors or several of the distributors. The restaurants are frequently served milk of Chesnut Farms, or Embassy, as the case may be. The effort is on the part of each driver to try to get his milk in to the exclusion of the other. He wants to sell more and more milk all the time. He is constantly at work trying to sell.

Mr. Miller: When you obtain business by advertising I suppose you mean by that that some person will see your advertisement and being in the need of milk perhaps call you by telephone and ask you to start delivering; is that right?

Mr. Whiteford: I imagine we get some results from that advertising. The newspapers I am sure over there would assert that we do.

Commissioner Randolph: You would not advertise if you did not think you got some results from it.

Mr. Whiteford: That is right; we would not.

Mr. Miller: What proportion of your milk approximately is delivered on what you might call a pre-order basis, that is, the route man would know ordinarily how many quarts a customer is going to take that day?

Mr. Whiteford: I do not know whether Mr. Davison could estimate that or not, but I would say that 75 per cent of it to the doorstep.

Mr. Davison: That would be a good statement because while they do have standing orders they are increased and [fol. 99] decreased and cut off altogether by leaving a note in the box by anyone that goes away, so I think 75 per cent would be a fair estimate.

Mr. Whiteford: That is the estimate as to retail?

Mr. Davison: Yes.

Mr. Whiteford: When you come to wholesale delivery would it average 50 per cent?

Mr. Davison: I do not think so. We do not know what the stores take. They might take ten cases today and some rainy day they might only take one. We do not know what they are going to take until the truck gets there.

Mr. Miller: But you have a pretty good idea they are going to take some?

Mr. Davison: We hope so. Some days we take out a whole load of milk and bring back half of it. On other days we will have to send a feeder truck because they sold out.

Mr. Miller: Would that 75 per cent of standing orders correspond with your orders?

Mr. Rawlins: I think so on retail. As they pointed out on wholesale, I would say we could not figure much over 40 per cent. We try to outguess ourselves on rainy days and do not load our trucks so full on rainy days.

Mr. Miller: What proportion of your collections are made by mailing the remittance in the form of a check or otherwise to your District of Columbia office? Do you have [fol. 100] any rough idea, most of it, or what?

Mr. Whiteford: At wholesale it is practically all made in Virginia.

Mr. Miller: They pay cash or sign a receipt?

Mr. Rawlings: Yes, cash is true of our wholesale, C. O. D.

Mr. Miller: And for Chesnut Farms?

Mr. Whiteford: Yes.

What do you do with respect to your schools?

Mr. Rawlins: The schools mail their checks in, sometimes several months late.

Mr. Miller: How about the home deliveries? What is the method of making collections there?

Mr. Rawlins: Of course, the route salesmen, what we call our drivers—we have no drivers—we depend on our men on our trucks to be our salesmen, and they make up their own bills and leave their bills at the home. Sometimes the lady pays them right then. Sometimes she will put it out in the bottle the next morning or two or three mornings later.

Many times they will have an arrangement whereby they will call back the day after her husband is paid and in other instances they mail checks in to the dairy, and to break that down, I do not think I could intelligently unless I went back and checked them. I do not know the proportion that mail them in and those that pay the men.

[fol. 101] Mr. Miller: Is that about the way it is for Chesnut Farms?

Mr. Whiteford: That is about the way it is for Chesnut Farms except that perhaps we might guess that 50 per cent of it is sent in by check.

Mr. Davison: That would be only a guess, but on the volume of milk being sold as a whole, the fact that we sell about the same amount of wholesale as retail—that is all cash—and we know that we collect more cash than we get by check.

Mr. Miller: Would you say at least 50 per cent of your retail or doorstep payments are made by check, excluding the wholesale?

Mr. Davison: I do not think that they mail in that many. Of course, some are paid by check, but they hand them to the driver when he delivers the milk; save three cents postage.

Mr. Miller: There is one other question I wanted to ask Mr. Whiteford and perhaps the Thompson Dairy can answer the same question. Perhaps Mr. Derrick is really the best one to answer this question, but *it is* not true, Mr. Derrick, that from November, 1945 until March, 1947 the minimum prices for producers were regulated by the Secretary of Agriculture?

Mr. Derrick: It would be a longer time than that. It would be from February, 1940 to March 31, I think it was [fol. 102] 1947.

Commissioner Randolph: When did they have the Federal market?

Mr. Derrick: That would be the time.

Mr. Owen: Mr. Derrick, would that order be for the District of Columbia for quite a number of years and then later they were petitioned to enlarge their marketing area to include part of Virginia, which was then the Arlington-Alexandria area?

Mr. Derrick: That is true, so that I am not sure of the date when the Federal order encompassed the Virginia area.

Mr. Whiteford: I think we can agree that certainly the order was on in Virginia in 1945 through the date 1947. We had it in the District long before that.

Mr. Saunders: It was around 1945 that the order took effect over in Arlington and Alexandria.

Mr. Owen: The Commission was also operating in Arlington and Alexandria during the time that the Federal order was on the producer level.

Commissioner Randolph: Would this be correct: That in the early 1940's the Federal market order embraced Washington and about 1945 it was extended to embrace the Arlington-Alexandria area, and the marketing order was terminated in 1947?

Mr. Whiteford: March of 1947.

[fol. 103] Mr. Miller: As to that date I might state that filed with the original of the petition for appeal made on behalf of the Arlington County Board there is a copy of the order which applied the Federal milk regulation to the Alexandria-Arlington area, together with a certificate that it is true and correct from the Solicitor of the Department

of Agriculture, and I have a copy of both the certificate and the order here and it reads:

"Issued at Washington, D. C. this 26th day of October, 1945 to be effective on and after the third day of November, 1945."

Then there is likewise filed with the petition a certified copy of an order of the Secretary of Agriculture, effective March 31, 1947, which removes that regulation, so I think that will verify the dates.

Is it my understanding that your purchases from the producers are made in the District of Columbia except for some of Chesnut Farms at Frederick, Maryland? Is that correct?

Mr. Whit-ford: Well, the deliveries are f.o.b. District of Columbia.

Mr. Miller: You purchase it, do you, from one Association?

Mr. Whit-ford: The Association, as I understand it, is the selling agent for its members. We all have our own [fol. 104] individual list of shippers that ship milk to us. We have had shippers for 25 and 30 years and some of them as long as 40 years. They have been shipping to us that long and for many years none of them belonged to the Association and then in the thirties the bulk of them belonged to the Association, and the Association began to sell their milk for them to us, and we aim to keep our shippers. We have built them up over many years.

We have our own inspectors that go to their barns and we do everything we can to help them produce a higher quality of milk all the time and our relationship is with each individual shipper, but the Association is the selling agent for that shipper and we pay the Association.

Mr. Miller: Mr. Derrick, is it your understanding that the milk is bought from the individual producers, or from the Association?

Mr. Derrick: Just as Mr. Whiteford stated, that they have their field contact individual producers, as well as our field men, but the purchase is made from the Association as a representative agent for the producer.

Mr. Whiteford: The producer gives you written authorization to do that as a member?

Mr. Derrick: That is right.

Commissioner Randolph: I would like to interject this: You of course have no contract with the Association, but if you need any extra milk because of any unfor-seen [fol. 105] circumstances—because of Government contracts or because of various other things that may arise—it has been your policy in the past to have the Association as such furnish you with this extra milk that you may need. Where they get it is up to Mr. Derrick; is that right?

Mr. Whiteford: That is right, and on many occasions during the emergency, that is, during the war, for instance, Mr. Derrick went out and bought milk and the Association paid higher prices for that milk than they charged us in order to supply us with the milk.

In later times the Association was in a position where it just could not supply milk. We went out and canvassed the country to buy milk ourselves wherever we could get it. It has been purchased by the Association on a brokerage basis, on almost any kind of a basis, and certainly as it developed in the trial in the anti-trust case, the Association for a number of years sustained substantial losses on milk that it went out and bought and handled so that we might have a supply in this metropolitan area. I think that is true, is it not, Mr. Derrick?

Mr. Derrick: That is right. There is only one thing, Mr. Whiteford; I do not believe we bought it on a brokerage basis. I do not think we ever charged a brokerage fee for any member we bought for.

Mr. Whiteford: I could be incorrect about that. Maybe we did not pay a brokerage fee.

[fol. 106] Mr. Derrick: We delivered it to you at the purchase price and did sustain substantial losses in handling and so on.

Commissioner Randolph: Then, under ordinary circumstances any emergency milk is obtained through the Association if the emergency is such and milk is so scarce that you cannot get it through the Association, you get it as best you may from wherever you may as long as it gets the O.K. of the health authorities?

Mr. Whiteford: That is right. The Association very naturally has the biggest source of supply and most con-

tacts, and when we need milk we call on them. They are the people that have the contacts for supply. If we cannot get it from there, we get it from wherever we can get it. We get it from other branches, National Dairy, or we get it from individual shippers or milk brokers, wherever they happen to have it, provided it complies with the proper regulations.

Mr. Miller: Mr. Derrick, you can probably answer this question for me best. Am I correct in understanding that the deliveries of producers' milk to Virginia distributors are those that are marked with a hundred per cent in this first column of the exhibit?

Commissioner Randolph: Mr. Miller, we are going to have a man from Virginia, a 100 per cent Virginia distributor, so he can testify to that a little more accurately.

Mr. Miller: He is going to testify as to his own [fol. 107] business, I suppose. I thought Mr. Derrick could tell me which are the Virginia distributors and which are the District of Columbia distributors.

Mr. Derrick: I think Mr. Saunders is in a better position to answer that.

Mr. Saunders: The last five listed, which are Alexandria Dairy, Birmingham Dairy, Mason F. Smith, Ray P. Mills, and Loudoun Distributing Company, are the five distributors located in Virginia who sell 100 per cent of their sales in Virginia and the note that you see on the bottom for the period covered indicates that they sold 33.68 per cent of the total sales in Virginia.

On their purchases, Alexandria Dairy purchased 100 per cent of their milk, of their sales, from Virginia; Birmingham Dairy purchased 100 per cent of their milk from Virginia; Mason F. Smith, who is a small producing distributor, purchased a very small amount this period from Chesnut Farms in bottles already packaged; Ray P. Mills, who is a producer-distributor, produced all of his own sales; and Loudoun Distributing Company, as is noted, purchased all of their milk in Washington from Chesnut Farms already packaged.

Does that answer your question?

Mr. Miller: The others I assume are the District of Columbia processors.

Mr. Saunders: Yes; Chesnut Farms, Thompson's Dairy, [fol. 108] Embassy Dairy, Lucerne Milk Company, Wakefield Dairy, and Highland Dairy are all located in the District of Columbia and licensed to do business in the Arlington-Alexandria area.

Mr. Miller: Mr. Chairman, the third largest District of Columbia distributor in these figures, which is located in the District of Columbia, is Lucerne Milk Company. I notice that they have a couple of gentlemen here. I was wondering if it would be all right if I asked them a few questions about their methods of doing business. Could you give me any help on that?

Commissioner Randolph: Suppose we take a few moments' recess at this time.

(At this time there was a short recess, after which the hearing was resumed.)

Commissioner Randolph: Before Mr. Hanson makes a statement we would like to say for the record—which is agreed to by Mr. Miller and others—that the set-up of Embassy Dairy and Wakefield Dairy, with the exception of the volume which is set out in the percentage figures in the exhibit of Mr. Saunders, is substantially similar to that of Chesnut Farms and Thompson's Dairy.

This statement is made because there are no representatives of these two concerns present to testify. There likewise is no representative of Highland Dairy, but it is agreed that the set-up and sales of Highland Dairy are [fol. 109] substantially similar to those set out in the opinion of the Agnew case, that is, Highland Farms Dairy against Agnew, 17 Federal Supplement 575; affirmed 300 U. S. 608; 57 Supreme Court 549; 81 Law Edition 835.

We have with us Mr. Burchell of Alexandria Dairy, and he will explain, if necessary, as to the set-up of the sales and flow of milk as to his concern. The sales of Birmingham Dairy, Mason F. Smith, Ray P. Mills, and Loudoun Distributing Company, the other four distributors selling only in Virginia, are substantially similar to that of Mr. Burchell's concern, the Alexandria Dairy, with the exceptions as set out in Mr. Saunders' statement a few minutes ago.

We will now hear from Mr. Hanson as to the flow of milk in his concern.

Mr. Hanson: Gentlemen, we have no prepared statement this morning and did not come prepared to make one. We will be glad to answer any questions put to us, and we will be glad to, if we cannot answer them, if you submit them to us in written form, get the answers for you.

We do have a plant over here on 2040 West Virginia Avenue in Washington, D.C. We receive all of our milk exclusively at that plant. We buy it all from the Virginia-Maryland Milk Producers Co-op.

Commissioner Randolph: Do you buy it from the co-op or from the members of the co-op?

[fol. 110] Mr. Hanson: We have approximately the same system as Chesnut Farms, Thompson's, and others, having our own producers and our field man to contact those producers, but the milk, as I understand, is sold to us by the co-op as the agent of the individual producer. We make no direct purchases from any of the producers.

Commissioner Randolph: Do they have any direct deliveries to you from their plants, or does it come through the co-op's receiving station or holding tank or anything like that?

Mr. Hanson: We have in some instances—I think Mr. Derrick will confirm me on this—farmers under contract with the co-op to deliver to our plant. We also have on the Maryland side—I do not believe in Virginia yet—several tanks set up.

Mr. Derrick: Yes.

Mr. Hanson: We have our own tanks on the truck route. What the contractual relationship is I do not know. That is something we would have to check and answer later.

Commissioner Randolph: After it gets to your plant in Washington—what is the address?

Mr. Hanson: 2040 West Virginia Avenue, N. E.

Commissioner Randolph: It is all processed and packaged there?

Mr. Hanson: That is correct.

[fol. 111] Commissioner Randolph: Then it is shipped out in trucks to the various Safeway Stores?

Mr. Hanson: That is correct.

Commissioner Randolph: And then sold from the Safeway Stores wherever they may be located?

Mr. Hanson: That is true.

Commissioner Randolph: You operate as Lucerne Milk Company and on your bookkeeping I presume you keep your milk transactions separate from everything else, but it is not a separate corporation from the Safeway Stores, is it?

Mr. Hanson: That is true, it is not a separate corporation. It is what we term an operating division. However, the accounting system, the bookkeeping, et cetera, is all kept on a separate basis and a billing is made to our retail operating division here in Washington for all the milk that the milk company distributes to the various Safeway Stores.

One other item of interest is that the drivers on these milk trucks receive exactly the same commission basis as the route salesmen do, the other wholesale drivers.

Mr. Whiteford: Other wholesale drivers of——

Mr. Hanson: Of other dairies in this area.

Commissioner Randolph: So for bookkeeping purposes you act as if you are really a separate entity?

Mr. Hanson: That is correct.

Commissioner Randolph: Although from a corporate [fol. 112] standpoint you are not?

Mr. Hanson: That is correct.

Commissioner Randolph: And you do bill yourself and all the various other features of cost accounting enter into it as if you were a separate organization?

Mr. Hanson: That is correct.

Commissioner Randolph: So there cannot really be any actual sale, I suppose, from the Lucerne Milk Company as an operating division of Safeway to Safeway when it delivers milk to the Safeway Stores, except for bookkeeping purposes?

Mr. Hanson: The Emergency Court of Appeals and the United States Court of Claims have both so held, that we cannot sell to ourselves.

Commissioner Randolph: You do not have any house to house deliveries?

Mr. Hanson: No. All the Lucerne milk is delivered directly to the Safeway Stores, which are retail grocery

stores and all the Lucerne milk is sold through the retail grocery stores. There is no delivery of any other type—to schools, homes, or anywhere else.

Commissioner Randolph: Your sole outlet is through your own stores?

Mr. Hanson: That is correct.

Mr. Miller: Just one other small question. These trucks that make the delivery are trucks belonging to Safeway [fol. 113] Stores or Lucerne, whatever you want to call them?

Mr. Hanson: No, they belong to Cortland Corporate Equipment Lessors, Inc., which is another wholly-owned corporation of Safeway Stores, which we lease them to.

Mr. Miller: They are leased to Lucerne?

Mr. Hanson: That is correct.

Commissioner Randolph: You own that which leases it to the division of the Safeway Stores?

Mr. Hanson: That is correct, and there is a rather interesting case, Safeway against Joiner, on that in Virginia.

Mr. Miller: Is that a tort liability case?

Mr. Hanson: It involves a matter of taxes. That held that they could not tax us an additional tax because they were operating under that set-up.

Commissioner Randolph: Does anybody think that should be added to in any way, or are there any further questions of Mr. Hanson? Do you have any further statement, Mr. Hanson?

Mr. Hanson: None. I will be glad to answer any questions you may have, or if you want some submitted in writing we will be glad to answer.

Commissioner Randolph: That takes care of the distributors who have plants in the District, and possibly Mr. Burchell of Alexandria Dairy might wish to make a few statements as to his set-up.

[fol. 114] Mr. Burchell: I will be glad to.

Mr. Chairman, members of the Commission, and gentlemen: My name is M. H. Burchell, and I operate and am President of the Alexandria Dairy Products Company. We are located at Pittman and Princess Streets in Alexandria, Virginia, and we buy all of our milk from producers

through the Maryland-Virginia Milk Producing Association, and it is delivered to our plant in Alexandria.

We sell all of our milk in Virginia. We sell no fluid milk other than in Virginia, Alexandria, Arlington, and vicinity. We do not deliver any milk in the District of Columbia. All of our purchases are in Virginia, and all of our sales are in Virginia.

Commissioner Randolph: Approximately one-third of the milk sold in the Arlington-Alexandria market is sold by your concern?

Mr. Burchell: I would think so.

Commissioner Randolph: That is what our figures show here.

Is there anything further?

Mr. Miller: I have one question I might ask.

What proportion of your milk is sold in Arlington, roughly, Mr. Burchell?

Mr. Burchell: I cannot give you the exact figure, sir. I would not know.

[fol. 115] Mr. Miller: Roughly.

Mr. Burchell: Probably a third of my sales.

Mr. Whiteford: Mr. Burchell, do you operate insofar as routes and route salesmen and solicitors are concerned, on the same basis as Chesnut Farms and Thompson's?

Mr. Burchell: Yes, sir. We do the same thing. We have salesmen that go out and try to solicit business the same as the other dairies, the same as our competitors.

Mr. Whiteford: And you sell wholesale to stores and restaurants and retail to the homes, house deliveries?

Mr. Burchell: Yes, sir.

Mr. Whiteford: And you make your collections substantially on the same basis as indicated by Chesnut Farms and Thompson's and others?

Mr. Burchell: On the same basis. Our workmen work on a salary and commission, the same as the other distributors.

Mr. Whiteford: Your labor contract that covers your plant operations, your route salesmen, and your drivers, is part of the same union contract with all the Washington distributors; is that correct?

Mr. Burchell: Yes, sir.

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Mr. Whiteford: Negotiated concurrently with all of them, with the union?

Mr. Burchell: That is right.

Mr. Whiteford: And so far as you know your whole [fol. 116] system of operation is identical with Chesnut Farms, Embassy, and others?

Mr. Burchell: Exactly.

Commissioner Randolph: With the exception that you do not cross the State line in any of your operations?

Mr. Burchell: That is correct.

Commissioner Randolph: With the statement as to the operations of the other dairies who do not have representatives here, I think that completes the picture as far as the distributors are concerned. We have Mr. Derrick here, who is the manager of the cooperative that supplies 85 per cent more or less of the milk in the metropolitan area and if anybody would wish to ask him any questions or if he would like to make any statements to verify the matter, we would be glad to have them.

Mr. Derrick: I have no statement, Mr. Chairman. I would be glad to answer any questions I can.

Mr. Miller: What was that percentage of milk sold in the metropolitan area that was handled through the cooperative?

Mr. Derrick: It has been reported around 80 per cent to 85 per cent.

Mr. Miller: What are the other sources of milk, other than handled through you?

Mr. Derrick: We have the other cooperative, the Capital Milk Producers Association. They have a number of producers, and then there are a large number of independent [fol. 117] producers that do not care to become members of any cooperative.

Mr. Miller: Does Capital Cooperative include any Virginia producers?

Mr. Derrick: I frankly do not know.

Commissioner Randolph: You can say, though, that in that 15 to 20 per cent that do not belong to your organization there are members in both Virginia and Maryland and possibly other States, but you do not know the percentage?

Mr. Derrick: That is right.

Commissioner Randolph: What percentage of your members are in Virginia and what percentage are elsewhere?

Mr. Derrick: Of our total supply?

Commissioner Randolph: Yes, sir.

Mr. Derrick: Approximately 50-50.

Commissioner Randolph: 50 per cent are in Virginia and 50 per cent—well, some of them are in West Virginia and Pennsylvania, I believe.

Mr. Derrick: Yes. That would still balance up pretty close.

Do you have that exact?

Mr. Saunders: I have it, Mr. Derrick and Mr. Chairman, for one month, the percentages for the month of March.

Mr. Derrick: Mr. Saunders got that from our books when I was not present, so I assume that is correct.

Mr. Saunders: For the month of March, 1951 the [fol. 118] Virginia members of the Maryland-Virginia Milk Producers Association produced 48.73 per cent of their total production. The Maryland producers represented 48.25 per cent. West Virginia producers represented 1.45 per cent. Pennsylvania producers represented 1.57 per cent of the production.

I have the number. If it is all right with Mr. Derrick I will give you the number of producers located in each State if you would like to have that.

Mr. Derrick: It is all right with me.

Mr. Miller: I think it would be helpful.

Mr. Saunders: For the same period: 823 located in Virginia, 829 in Maryland, 33 in West Virginia, and 35 in Pennsylvania, making a total of 1720 producers. For that period no other milk was handled by the Association other than the members' production.

Commissioner Randolph: Would you mind if the volume would go in there, sir, or not?

Mr. Derrick: If it will help you I have no objection.

Commissioner Randolph: We have it, of course. The thing is that it might help the court, who is going to consider this, too.

Mr. Derrick: We have no secrets.

Mr. Saunders: The volume by State in towns: Virginia, 21,279,000 pounds; Maryland, 20,791,082 pounds; West

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Virginia, 625,997 pounds; and Pennsylvania, 673,957 [fol. 119] pounds making a total for the period of 43,091,-315 pounds.

Commissioner Randolph: I noticed, Mr. Derrick, that at that particular time no other milk was handled by your Association than that from your regular producers. Perhaps you can amplify the statements already made as to emergency milk that is required by your customers.

Mr. Derrick: I think we would have to go back to approximately April, 1949. Prior to that time, between 1942 and probably April, 1949, we did purchase other milk, as has been indicated, but I think since that time we have been able to supply, since April, 1949, all our customers.

Commissioner Randolph: Since 1949?

Mr. Derrick: April, 1949. I think that is the correct date.

Commissioner Randolph: And since that time you have not bought any milk from other than your producers?

Mr. Derrick: Not for our metropolitan areas.

Commissioner Randolph: Is there anything else, Mr. Miller, that you would wish to bring out?

Mr. Miller: No, I think it is very well covered.

Commissioner Randolph: Does anybody else wish to bring anything out?

(Discussion off the record.)

Commissioner Randolph: After consulting with interested parties it was determined that possibly it would be of help [fol. 120] to the court in its determination for a statement to be made as to the administrative practice of the Milk Commission with reference to the control of milk in the metropolitan area or any parts thereof.

The regulations for the Arlington-Alexandria market have been filed as part of these proceedings. They of course speak for themselves, but in any possible clarification as to the administrative practice with reference to them we will state that any sales by a producer to a distributor whose plant is located in Virginia are considered to come within the scope of the regulations.

Those that are made to the distributors whose plants are in Washington do not. In other words, we consider the

sales by the producers to the Alexandria Dairy Products Company, whose plant is located in the Arlington-Alexandria area, to come within our regulations.

Those to Chesnut Farms, whose plant or receiving station is located outside of Virginia, are not considered by the Commission to come under the regulations.

The above statement has reference to sales of milk from producers to distributors. As far as sales from distributors to either stores or to homes, doorstep deliveries, we consider any such transactions as may occur within the Arlington-Alexandria market area as defined in the regulations to be under the control of the Milk Commission and to come [fol. 121] within the scope of these regulations as regards to the pricing as set forth in the regulations.

As far as sales from distributors to stores such as A & P and such, we consider the sales by them, by the distributors to such stores, as are located in the market area, to come within the regulations of that area; likewise the sales of these stores to the general public.

This in general comprises the scope of our regulations as they interpret them.

We have an appointment with the Budget Committee in Richmond at three o'clock, and it is now eleven-thirty. Mr. Turner and Mr. Owen have to be there, and we would like to have argument on this matter. The court instructed us to consider the evidence and after reviewing the evidence to make, if necessary, any change in our regulations, and I presume in our administration of the regulations, that is, if it is necessary, and of course arguments on that would help us a great deal in determining it.

We would like to have everything we can to arrive at a proper determination of this, and we would like to hear from counsel. How long would you like to talk, Mr. Miller?

Mr. Miller: I talked an hour to Judge Snead and I do not think I could do it or cover it in any less time.

Mr. Blum: Is that a repetition of what you previously said in your argument?

[fol. 122] Mr. Miller: It would be in part because, after all, it is the same issue. I would do it differently, I will say, because the contentions are a little bit different, and so forth.

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Commissioner Randolph: I prefer, of course, that the whole thing be dumped back in Judge Snead's lap, but he has held otherwise apparently and told us to reconsider the whole thing and I think to do it in a proper manner we should hear from counsel on that, so I suppose we should.

As I said, I would rather you gentlemen argue to Judge Snead, but maybe you will have to do both now.

Mr. Whiteford: I do not look on this as a matter of necessity for you to hear a great deal of argument on it. If Mr. Miller wants you to change your view I think it would be up to him to state merely what his position is. Frankly, I do not understand what his contention is, and I should think in five minutes he could state what his position is.

Mr. Miller: I cannot state my position in five minutes. I cannot state it in less than an hour.

Mr. Whiteford: It is up to the Commission.

Commissioner Randolph: Let us take a recess and then go to it.

(At this point there was a short recess, after which the hearing was resumed.)

Commissioner Randolph: It has been suggested and [fol. 123] concurred in by interested parties that instead of having oral arguments at this time, that after the evidence has been typed up written memoranda or briefs shall be filed as part of these proceedings by any interested parties. We will consider them and take any appropriate action that we see fit, and if see fit not do anything we will pass them on up to Judge Snead as part of the proceedings.

Unless unfor-seen circumstances come up we will expect Mr. Miller's brief by November 10, and of course if he can get it in before that it will be even better. Anybody who wishes to reply to that will have two weeks to do so after he submits it, and anybody who wishes to reply to it or consider replying to it should ask Mr. Miller for a copy of his brief to be sent to him at the same time as we receive it, and they should, of course, file copies with any other interested parties who may request them.

Will you send us two copies of yours?

Mr. Miller: Yes, sir.

Mr. Blum: How many copies of the reply brief do you want?

Commissioner Randolph: We want two, and then of course whoever else is interested.

Mr. Miller: There is one problem that will be raised. In reply they may raise or cite some cases that I might consider entirely inappropriate and might consider it as being [fol. 124] distinguishable. Would it be proper if I could, subsequent to their briefs, make such distinctions in some further communication?

Commissioner Randolph: I think it is entirely proper that you should have a week to reply to them.

We are very informal in our procedure, and of course if anything comes up and that is not agreeable we will be delighted to do what we can to make it easier to change the procedure, but unless we can do that is the outline, and by that way we will get something done, we hope, by the first of December.

Mr. Whiteford: Will that hold up the matters that were discussed yesterday, that is, your decision on them?

Commissioner Randolph: I do not think that we should do that.

If we find that we should make a decision on the merits, as it were, in the proceedings of yesterday, we shall do so with the right of course to be guided later by the briefs that are submitted.

Mr. Miller: You have one problem, and that is that the statute governing the appeal requires the appeal to be made within a certain number of days after the order and I do not know whether anybody has any discretion or power to waive that statutory requirement.

Commissioner Randolph: We are not binding ourselves [fol. 125] to it, Mr. Miller, but it has been the policy of the Commission, and I hope will continue to be so, to always give an opportunity for anybody to correct any mistake we have and not to cut them off from appeal, and I am sure that we would make every attempt, and it is my disposition to say that we would, to either reconsider it or do something so that you or anybody else who would be affected would

not be cut off from appeal. If they wanted to appeal that they could do it, of course.

Mr. Whiteford: The only reason I raised it was because it does not seem to me that the other matters ought to wait a decision as late as the first of December merely because we cannot get these briefs in. If that is going to hold that up, on account of these briefs, I then say, put them in by Monday or Tuesday.

Commissioner Randolph: We will now adjourn.

(Whereupon, at 11:45 a.m., Wednesday, October 10th, 1951, the hearing was closed.)

[fol. 126]

EXHIBIT No. 4

Before the State Milk Commission

Maryland-Virginia Milk Producers' Association

State	Members' Production	Per Cent	Number of Producers
Virginia	21,000,279	48.73%	823
Maryland	20,791,082	48.25	829
West Virginia	625,997	1.45	33
Pennsylvania	673,957	1.57	35
Total	43,091,315		1,720

No other milk handled during this period.

State Milk Commission

FJS Jr.

[fol. 127]

March, 1951

EXHIBIT No. 5

Before the State Milk Commission

Sales and Receipts of Distributors Selling in the Arlington-Alexandria Market

Distributor	% Each Distributor Sold in Virginia to His Total Sales	% Each Distributor Sold in Virginia to the Total Virginia Sales	% Each Dis. Purchased from Virginia Producers to His Total Purchases	% Each Dis. Purchased from Virginia to Total Virginia Purchases	% of Virginia Sales to Virginia Purchases
Chesnut Farms	13.77%	33.03%	46.09%	53.45%	28.92%
Thompson's Dairy	23.00	18.15	55.50	20.58	41.28
Embassy Dairy	3.74	2.05	8.23	2.24	42.82
Lucerne Milk Co.	17.96	10.53	15.30	4.22	116.90
Wakefield Dairy	5.04	1.50	24.32	3.38	20.74
Highland Dairy	17.53	1.06	14.45	.41	121.03
Alexandria Dairy	100.00	33.01	100.00	15.45	100.00
Birmingham Dairy	100.00	.34	100.00	.16	100.00
Mason F. Smith	100.00	.19	96.69	.08	103.42
Ray P. Mills	100.00	.06	100.00	.03	100.00
*Loudoun Dis. Co.	100.00	.68	-0-	-0-	-0-

* Purchased all milk sold from Chesnut Farms, Washington, D. C., already packaged.

Five Distributors located in the state selling 100% of their sales in the state sold 33.68% of the total sales represented for this period.

Three distributors located in the state, who purchased all of their receipts in the State, purchased 15.64% of the total purchases in Virginia.

State Milk Commission

FJS Jr.

[fol. 128]

EXHIBIT No. 6

BEFORE THE STATE MILK COMMISSION

Excerpt from the Minutes of the Commission, Held on December 28, 1951

The Commission, with Chairman Mark Turner not participating, having considered the evidence taken on October 9th and 10th concerning the distribution and flow of milk in the Arlington-Alexandria Market and the arguments of counsel thereon, and the Commission being of the opinion that no further order or action is necessary in the Arlington-Alexandria Market as a result of such evidence, it is ordered that the said evidence and other papers incident thereto be certified by the Secretary of the Commission and transmitted to the Circuit Court of the City of Richmond to be considered as part of the record in the case of *The*

County Board of Arlington County, Virginia, et als., versus *State Milk Commission.*

A True Copy:

John W. Owen, Secretary, State Milk Commission.

December 31, 1951.

[fol. 129] EXHIBIT No. 7

BEFORE THE STATE MILK COMMISSION

SECRETARY'S CERTIFICATE

I, John W. Owen, Secretary of the State Milk Commission, do certify that the foregoing papers, as set forth in the Table of Contents, are either the originals or copies pertaining to the Arlington-Alexandria Public Hearings, held in Alexandria, Virginia, and Washington, D. C., on October 9 and October 10.

John W. Owen, Secretary, State Milk Commission.

December 31, 1951.

[fol. 130] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

Re: The County Board of Arlington County, Virginia, a body corporate; et als., v. State Milk Commission.

MEMORANDUM OPINION—filed June 20, 1952

Gentlemen:

By a decree entered October 9, 1951, the court held that the notice which preceded the public milk hearing in the Arlington-Alexandria Market Area on January 11, 1951, was sufficient and lawful; that the State Milk Commission had authority to raise, lower or refuse to change the price of milk in said market area and that Arlington-Alexandria Market Order No. 4 increasing milk prices was not unreasonable or capricious. Since the record was devoid of

factual basis for a consideration of the question of interstate commerce as related to said market area, the court by said decree remanded the record to the State Milk Commission for the taking of such additional testimony as may be offered by the petitioners, the defendant or any other interested parties relating to the moving of milk in interstate commerce in said market area. The Commission was directed to certify and file with this court such additional testimony taken, and if said order No. 4 be amended by the Commission to file same with this court. The Commission filed the additional testimony but did not amend said order No. 4.

[fol. 131] Due consideration has been given the supplemental record and the memoranda submitted by counsel. Under the authorities cited therein as applied to the facts in this case, the court is of opinion that the minimum price regulation in question is not a burden on interstate commerce; that the State Milk Commission can legally fix the minimum sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market Area from trucks of the District of Columbia distributors and that Arlington-Alexandria Market Order No. 4 should be sustained.

Upon presentation of a proper decree, same will be entered.

Yours very truly, Harold F. Snead, Judge.

s/s.

[fol. 132] In the Circuit Court of the City of Richmond

[Title omitted]

Decree Dismissing Appeal—July 22, 1952

This cause came again on this day to be heard upon the petition for appeal, the answer thereto, the record certified to the Court by the State Milk Commission, the supplemental record of additional testimony certified by the State Milk Commission, taken pursuant to decree of October 9, 1951, heretofore entered in this cause, the memoranda submitted, and was argued by counsel.

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Upon consideration whereof, it appearing to the Court that the Arlington-Alexandria Order No. 4, establishing a minimum sale price for milk in the Virginia Arlington-Alexandria Market Area, does not constitute an unconstitutional burden on interstate commerce and that the State Milk Commission can lawfully establish the minimum sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market area, irrespective of the point of origin of the milk so delivered;

Now, therefore, it is adjudged, ordered and decreed that the State Milk Commission Arlington-Alexandria Market Order No. 4 be, and the same is hereby, sustained; that the [fol. 133] prayers of the petitioners herein be, and the same are hereby, denied, and that the petition for appeal herein be, and the same is hereby, dismissed.

Enter:

(S.) Harold F. Snead.

I ask for this:

(S.) Thomas M. Miller, Assistant Attorney General, Attorney for Defendant.

Seen:

(S.) Malcolm D. Miller, Attorney for Petitioners.

[fol. 134] In the Circuit Court of the City of Richmond

[Title omitted]

Notice to Clerk to Prepare Record for Appeal and Assignment of Errors—filed September 18, 1952

To the Clerk of the said Court:

You are hereby notified that a petition for writ of error in the above-styled cause will be applied for, and you are accordingly notified to proceed to get the record up, as required by law. Counsel for petitioners stipulates the record to be as follows:

1. Plaintiffs' petition for appeal, including attachments.
2. Defendant's answer.
3. Record received by the Court from the State Milk Commission.

4. Letter opinion of the Court, dated September 26, 1951.

5. Order of October 9, 1951, remanding the matter to the State Milk Commission.

6. Record received by the Court from the State Milk Commission on January 2, 1952.

7. Letter opinion of the Court dated June 20, 1952.

8. Final decree and order entered July 22, 1952.

9. This notice.

Assignments of Error

1. The Circuit Court of the City of Richmond erred in holding that the State Milk Commission can legally fix the minimum sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market Area [fol. 135] from trucks of the District of Columbia distributors and that the Arlington-Alexandria Market Order No. 4 should be sustained. Such commerce is interstate in a field beyond the control and jurisdiction of the Commonwealth of Virginia and the State Milk Commission by reason of (1) the commerce clause of the United States Constitution, and (2) occupancy of the field of regulation by Act of Congress in the Agricultural Marketing Agreement Act, 7 U.S.C., sec. 601 et seq., particularly sec. 608c.

2. The State Milk Commission has no jurisdiction of such interstate commerce by reason of section 3-381 of the 1950 Code of Virginia; but the holding that the Commission has such jurisdiction, if upheld, would render the regulation of the Milk and Cream Act of Virginia in violation of the United States Constitution.

3. The Court erred in holding that the question at issue in the proceeding was whether the minimum price regulation is a burden on interstate commerce; and such regulation is a burden on interstate commerce.

Given under my hand this 17th day of September, 1952.

(S.) Malcolm D. Miller, Attorney for Petitioners, Munsey Building, Washington 4, D.C.

Certificate of Service (omitted in printing)

(File endorsement omitted.)

[fols. 136-139] IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

[Title omitted]

DESIGNATION OF RECORD TO BE PRINTED—filed September 30, 1952

To the Clerk of the said Court:

Please transfer the record in the above-styled cause to the Clerk of the Supreme Court of Appeals of Virginia. The parts to be printed are designated as follows:

1. Plaintiff's petition for appeal, but not including attachments.
2. Defendant's answer.
3. Letter opinion of the Court, dated September 26, 1951.
4. Order of October 9, 1951, remanding the matter to the State Milk Commission.
5. Transcript of proceedings on October 10, 1951, before the State Milk Commission, including exhibit No. 1 mentioned on page 15 of transcript.
6. Letter opinion of the Court dated June 20, 1952.
7. Final decree and order entered July 22, 1952.
8. Notice to clerk to prepare record for appeal and assignment of errors, filed September 18, 1952.

(S.) Malcolm D. Miller, Attorney for Plaintiffs.

September 29, 1952.

I hereby certify that a copy of this document was mailed on September 29, 1952, to the Attorney General of the Commonwealth of Virginia, Counsel for Defendant.

(S.) Malcolm D. Miller, Attorney, Munsey Building, Washington 4, D.C.

(File endorsement omitted.)

[fol. 140] IN THE SUPREME COURT OF APPEALS OF VIRGINIA

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, a body corporate, ET ALS., Complainant,

v.

STATE MILK COMMISSION, Respondents

PETITION FOR APPEAL FOR WRIT OF ERROR—November 18, 1952

From the Circuit Court of Arlington, Virginia:

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, the County Board of Arlington County, Virginia, respectfully represents that it is aggrieved by a final decree made and entered on the 22nd day of July, 1952, by the Circuit Court of the City of Richmond, Virginia, in the above-styled cause (Chancery B-643) wherein the County Board of Arlington County is complainant, and the State Milk Commission is the defendant.

Summary of Facts and Proceedings in the Trial Court

The proceedings in the trial court involved the Milk and Cream Act as set forth in sections 3-346 to 3-383 inclusive, of the Code of Virginia, 1950.

The statement of the material proceedings in the lower court and the statement of the facts will be presented in this petition as one statement because facts are not in dispute.

On January 11, 1951, the State Milk Commission held a public hearing in Alexandria, Virginia, relative to the marketing of milk in the Arlington-Alexandria Market Area. Subsequent to the hearing by an order, rule or regulation designated as *Arlington-Alexandria Market Order No. 4* made, adopted and posted by the State Milk Commission of the Commonwealth of Virginia on January 21, 1951, the retail and wholesale prices of milk and cream in Arlington County were increased. Pursuant to Section 3-371 of the Code, the County Board of Arling-[fol. 141] ton appealed the action of the Commission to the Circuit Court of the City of Richmond. Two conten-

tions were made in that forum: (1) The Commission's order, increasing milk and cream prices, was unreasonable and capricious; because it was issued after notice and hearing which did not give actual notice or bring in issue the matter of increasing prices, and the issue presented and considered was limited to the question whether a seasonal reduction was to occur in the prices paid by the distributors to the producers. (2) The Commission is without authority or jurisdiction to regulate the prices of milk and cream moving in interstate commerce which has been processed and bottled in the distributors' plants in the District of Columbia and delivered directly to the residence doors of consumer-purchasers at retail in Arlington County, Virginia.

On September 26, 1951, the trial court ruled against the Complainant as to the first contention. As to the second contention the court was of the opinion that the record was not so constituted that the interstate commerce question could be considered. Exercising the authority granted in Section 3-371(3) of the Code of Virginia, 1950, the court remanded the record to the Commission for the taking of such additional testimony as may be offered by the complainant, the defendant, or other interested parties in the Arlington-Alexandria Market Area. The court directed the Commission to certify and file with the court such additional testimony taken, and any amendments or revisions made by the Commission to Order No. 4.

Pursuant to the court's direction, the Commission on October 10, 1951, held a hearing to determine the quantity of milk moving through the channels of interstate commerce to the Arlington-Alexandria Market. Participating in the hearing were representatives of the producers and distributors in the market area, the County Board of Arlington County, and staff employees of the Milk Commission. The most pertinent data to this appeal presented at the hearing was given in the form of an exhibit by Mr. F. J. Saunders, Jr. Auditor, Virginia Milk Commission. [fol. 142] This exhibit showed that the two largest distributors in the District of Columbia selling in the market area, Chestnut Farms and Thompson's Dairy, made 33.03 and 18.15 per cent, respectively, of the total

sales. Testimony by their representatives indicated that Chestnut Farms' doorstep deliveries amounted to approximately 50 per cent of their total, and for Thompson's Dairy the figure would be between 60 and 65 per cent. The Saunders' exhibit further indicated that District of Columbia distributors made approximately 66 per cent of the total sales, doorstep and store deliveries, of the total sales in the Arlington-Alexandria Market. Thus, the factual data for the determination of the interstate commerce issue was squarely placed before the Commission and the trial court.

The Commission filed the additional testimony and evidence with the court, but did not amend Order No. 4. On June 20, 1952, the court ruled that the minimum price regulation in question is not a burden on interstate commerce; and that the State Milk Commission can legally fix the minimum sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market Area from trucks of the District of Columbia distributors and that Arlington-Alexandria Market Order No. 4 should be sustained. A final decree and order in the matter was entered July 22, 1952.

[fol. 143] Question Involved

1. The authority of the State Milk Commission to regulate the sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market Area from trucks of District of Columbia distributors.

2. Whether or not the authority of the State Milk Commission to regulate the sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market Area is to be determined by the degree of "burden" placed upon interstate commerce.

Assignment of Errors

1. The Circuit Court of the City of Richmond erred in holding that the State Milk Commission can legally fix the minimum sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market Area from trucks of the District of Columbia distributors and that the

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Arlington-Alexandria Market Order No. 4 should be sustained. Such commerce is interstate in a field beyond the control and jurisdiction of the Commonwealth of Virginia and the State Milk Commission by reason of (1) the commerce clause of the United States Constitution, and (2) occupancy of the field of regulation by Act of Congress in the Agriculture Marketing Agreement Act, 7 U. S. C., sec. 601, particularly sec. 608c.

2. The State Milk Commission has no jurisdiction of such interstate commerce by reason of section 3-381 of the Code of Virginia, 1950; but the holding that the Commission has such jurisdiction, if upheld, would render the regulation of the Milk and Cream Act of Virginia in violation of the United States Constitution.

3. The Court erred in holding that the question at issue in the proceeding was whether the minimum price regulation is [fol. 144] a burden on interstate commerce; and such regulation is a burden on interstate commerce.

Argument

I

Regulation of Milk Delivered Directly in Interstate Commerce Is in a Field of Interstate Commerce which a State Cannot Regulate by Reason of the Commerce Clause of the United States Constitution.

A. The Commerce Clause of the United States Constitution restrains the States from imposing regulations or burdens upon direct movements in interstate commerce.

There is a field of interstate commerce in which the State has *no* jurisdiction, and this area must be distinguished from that in which interstate commerce may be regulated as an incident to regulation of intrastate commerce. The following rule to this effect is quoted from the very recent case of *Freeman* v. *Hewit*, 329 U.S. 249, 252; 91 L.Ed. 265; 67 S. Ct. 274, which explains the difference:

> "Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among

the States, but by its own force created an area of trade free from interference by the States. *In short, the* Commerce Clause, even without implementing legislation by Congress is a limitation upon the power of the States. *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761; *Morgan* v. *Virginia,* 328 U.S. 373. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history. This limitation on State power, as the Morgan case so well illustrates, does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between the States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables."

See also: *Missouri* v. *Kansas Gas Co.,* 265 U.S. 298, 307-8; [fol. 145] 44 S. Ct. 544; 68 L.Ed. 1027; *Lemke* v. *Farmers Grain Co.,* 258 U.S. 50, 58-9; 66 L.Ed. 458; 42 S. Ct. 244; *Shafer* v. *Farmers Grain Co.,* 268 U.S. 189, 45 S. Ct. 481, 69 L.Ed. 909; *McLeod* v. *Dilworth,* 322 U.S. 327, 349, 64 S. Ct. 1023, 1030, 88 L.Ed. 1304, 1319; *Spector Motor Service* v. *O'Connor,* 340 U.S. 602, 95 L.Ed. 435, 71 S. Ct. 508.

Some of the cases state that the field in which the States cannot act is that in which the interstate commerce is "national" in character. But the term "national character" has been defined to include transportation, purchase, sale, and exchange of commodities moving directly in interstate commerce. The following cases support that rule:

> "Interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities is national in its character, and must be governed by a uniform system." and "so long as Congress does not pass any law to regulate it, or allowing the States to do so, it thereby indicates its will that such commerce shall be

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free and untrammelled." *Leisy* v. *Hardin,* 135 U.S. 100, 190-110; 10 S. Ct. 681; 34 L.Ed. 128.

"'Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the states which consists of the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity, or by that means of transportation shall be free." *Bowman* v. *Chicago,* 125 U.S. 482, 485; 8 S. Ct. 681, 1062; 31 L.Ed. 700.

The distinguishable situations in which a State may regulate interstate commerce as an incident to State regulation should be concerned primarily with the commodity *before* or *after* it has been transported; and the States cannot regulate the incidents of the importation. The distinction is made in the following statements of the U.S. Supreme Court:

"But we think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed *after* coming within the State, but directly upon the business as it comes into the State from without or goes out from within." *Hall* v. *DeCuir,* 95 U.S. 488, 488-9; 24 L.Ed. 547. (Emphasis added.)

[fol. 146] "It is enough to say, that the power to regulate or forbid the sale of a commodity *after* it has

been brought into the State, does not carry with it the right and power to prevent its introduction by transportation from another State." (Emphasis added.) *Bowman* v. *Chicago,* 125 U.S. 465, 485; 8 S. Ct. 689, 1062; 31 L.Ed. 700.

In argument, before the Circuit Court of the City of Richmond, the State Milk Commission's counsel cited three cases, which should be distinguished on the facts as not involving the direct movement across state lines involved in this proceeding. There is *Milk Board* v. *Eisenberg,* 306 U.S. 346; 59 S. Ct. 528; 83 L.Ed. 752, which upheld State regulation of prices paid Pennsylvania producers by Eisenberg company, a Pennsylvania corporation, at its Pennsylvania receiving plant, from which the milk was later exported to New York. In that case the U. S. Supreme Court said:

"There is, therefore, a comparatively large field remotely affecting and wholly unrelated to interstate commerce within which the statute operates. These considerations we think justify the conclusion that the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress." (p. 353.)

There was also the case of *Parker* v. *Brown,* 317 U.S. 341; 63 S.Ct. 307; 87 L.Ed. 315; involving California regulation of prices of raisins paid to California producers by California processors. In that case the Court said (317 U. S. 361):

"Applying that test, the regulation here controls the disposition, including the sale and purchase, of raisins *before* they are processed and packed preparatory to interstate sale and shipment. The regulation is thus applied to transactions wholly intrastate *before* the raisins are ready for shipment in interstate commerce." (Emphasis added.)

There was also the recent case of *Cities Service Co.* v. *Peerless Co.* 340 U. S. 179; 95 L.Ed. 156; 71 S.Ct. 215, in

which Oklahoma regulated the minimum wellhead price on all gas taken from a natural gas field within Oklahoma although part of the gas later moved in interstate commerce. The court pointed out, however, the local concern of the State in conservation of its natural gas, and the fact that this gas was in intrastate commerce as well as interstate commerce. These cases, as well as others which might be cited all deal, however, with local incidents not directly concerned with the movement of the commodity across State lines.

[fol. 147] The State Milk Commission apparently is of the view that the sale of milk for delivery to Virginia consumers is a Virginia transaction, and hence the price is subject to the Commission's jurisdiction.

It is the position of the Arlington County Board that the sale for delivery to Arlington consumers is an integral and inseparable part of the transportation of the milk by trucks of the distributors from the District of Columbia to doorsteps of consumers in Arlington, and that the various acts or incidents attending the sale in Arlington are immaterial to the continued status of the transaction in interstate commerce. In other words, the importation is subjected to the requirement that the sales price must be that set by the Virginia Commission, and hence the State imposes a burden or obstruction to the interstate transaction, in violation of the U.S. Constitution.

The view of the State Milk Commission depends upon an erroneous conception of the status of the sale which is part of the direct movement in interstate commerce from the District of Columbia to Virginia. In this connection, the Court's attention is directed to the fundamental principle set forth in *Brown* v. *Maryland*, 12 Wheaton 419, in which the U.S. Supreme Court said:

> "What then is the just extent of the power to regulate commerce with foreign nations, and among the several states? The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior, and if this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it intro-

duces. Commerce is intercourse and one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic should cease at the point where its continuance is indispensable to its value. To what purpose should the power to allow importation be given if unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation and it is as essential an ingredient, as indispensable to the existence of the entire thing as the importation itself. It must be considered as a component part of the power to regulate commerce, and Congress has a right, not only to authorize importation, but to authorize the importer to sell. If the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable."

The same rule was followed in *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282, 42 S. Ct. 106.66 L.Ed. 239. That case raised an issue of validity of a Kentucky statute [fol. 148] which made unenforceable contracts by corporations not authorized to do business in the state. The corporation in that case sued for breach of contract made in Kentucky to deliver wheat grown in Kentucky on board rail cars at a Kentucky origin, which the corporation intended to move to its mill in Tennessee. The state court held the contract to have been in intrastate commerce and unenforceable, but the U.S. Supreme Court held to the contrary, saying that it was in interstate commerce (p. 292), and further stated (290-1):

"Where goods in one State are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. *Brown* v. *Maryland*, 12 Wheat. 419, 446-447; *American Steel & Wire Co.* v. *Speed*, 192 U.S. 500, 519. On the same principle, where goods are purchased in one State for transportation to another the commerce includes the

purchase quite as much as it does the transportation. *American Express Co.* v. *Iowa*, 196 U.S. 133, 143. This has been recognized in many decisions construing the commerce clause. Thus it was said in *Welton* v. *Missouri*, 91 U.S. 275, 280: 'Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all forms, including the transportation, purchase, sale, and exchange of commodities.' In *Kidd* v. *Pearson*, 128 U.S. 1, 20, it was tersely said: 'Buying and selling and the transportation incidental thereto constitute commerce.' In *United States* v. *E. C. Knight Co.*, 156 U.S. 1, 13, 'contracts to buy, sell, or exchange goods to be transported among the several states' were declared 'part of interstate trade or commerce.' And in *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211, 241, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities.' In no case has the court made and distinction between buying and selling or between buying for transportation to another State and transporting for sale in another State. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling it was not material whether it came first or last.

"A corporation of one State may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause." . . .

In the instant case we have, of course, sale of milk in the original package or bottle. It has long been a rule that a State cannot regulate the importation of a commodity and [fol. 149] its subsequent sale by the importer in the original package, whether the subsequent sale is retail

or wholesale. See *Schollenberger* vs. *Pa.*, 171 U.S. 1, 18 S.Ct. 757; 43 L.Ed. 49. In that case the U. S. Supreme Court held invalid a Pennsylvania statute which prohibited importation and sale of oleomargarine in that State.

The rule has also been applied to milk. In *Baldwin* v. *Seelig*, 294 U. S. 511, 55 S. Ct. 497, 101 A.L.R. 55, 79 L. Ed. 1032, the U. S. Supreme Court went beyond the original package doctrine where the milk was bottled for sale after it had arrived in New York in cans. The Court held that the sales price in New York still was not subject to State regulation, and said (527-8):

> "The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended.
>
> "The statute here in controversy will not survive that test. A dealer in milk buys it in Vermont at prices there prevailing. He brings it to New York, and is told he may not sell it if he removes it from the can and pours it into bottles. He may not do this for the reason that milk in Vermont is cheaper than milk in New York at the regimented prices, and New York is moved by the desire to protect her inhabitants from the cut prices and other consequences of Vermont competition. To overcome that competition a common incident of ownership—the privilege of sale in convenient receptacles—is denied to one who has bought in interstate commerce. He may not sell on any terms to any one, whether the orders were given in advance or came to him thereafter. . . ."
>
> ". . . It is one thing for a state to exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets. It is a very different thing to establish a wage scale or a scale of prices for use in other states, and to bar the sale of the products, whether in the original package or in others, unless the scale has been observed."

In the very recent case of *Hood* v. *DuMond*, 336 U. S. 525; 69 S.Ct. 657; 93 L.Ed. 865; the U.S. Supreme Court cited the above-quoted decision with approval, and said:

> "*Baldwin* v. *Seelig*, 294 U.S. 511, is an explicit, impressive, recent and unanimous condemnation by the Court of economic restraints on interstate commerce for local economic advantage, but it does not stand alone. This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interests of local health and safety."

[fol. 150] Even in this latter field of health regulations, however, the Court has forbidden the States to limit the sources of supply of milk in interstate commerce; see *Dean Milk Co.* v. *Madison, Wis.*, 340 U.S. 349; 71 S.Ct. 295; 95 L.Ed. 228.

The scope of *Hood* v. *DuMond*, supra, is indicated by the dissenting opinion of Justice Black, who said (336 U.S. 555):

> "Numerous cases, for examples *Parker* v. *Brown*, 317 U.S. 341, and *Milk Board* v. *Eisenberg*, 306 U.S. 346, which made judicious appraisels under the Cooley rule are gently laid to rest. Their interment is tactfully accomplished, without ceremony, eulogy, or report of their demise. The ground beneath them has been deftly excavated by a soothing process which limits them to their facts, their precise facts, their 'plain requirements' . . . State regulatory agencies too will be relieved of a large share of their traditional duties when they discover that bad local business practices are now judicially immunized from state regulation."

B. Federal regulation of milk prices has resulted in exclusion of State regulation in the Arlington-Alexandria Market Area.

Interstate commerce in milk was regulated from November 1945 to March 1947 by the Secretary of Agri-

culture under the Agricultural Marketing Agreement Act (7 U.S.C. sec. 601 et seq., particularly sec. 608c), but that regulation was terminated by the producers, as the Federal statute permits them to do. The Federal statute was enacted not only "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy . . ." etc., and to that end the prices paid producers are subject to minimum price regulation. However, the regulation must also be such as to "protect the interests of the consumer by . . . " etc. as provided in section 602. The term "interstate commerce" is given broad definition in section 610 (j). Section 610 (i) provides that the Secretary of Agriculture may, upon request, exercise his powers cooperatively with State officials.

The Federal and Virginia statutes are different in that [fol. 151] the State statute authorizes direct regulation of retail prices, and maximum as well as minimum prices to consumers, while the Federal regulation provides for protection of the consumer in an indirect manner. But the fact that regulation is different, or complementary, does not result in the conclusion that some portion of the field has been left open to the States; see *Hines* v. *Davidowitz*, 312 U.S. 52, 66-7; 61 S.Ct. 399; 85 L.Ed. 581, in which the court said:

> "And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or *complement the federal law, or enforce additional or auxiliary regulations.*" (Emphasis added.)

In Virginia, of course, the regulation of retail milk prices in interstate commerce indirectly regulates the wholesale prices paid to producers, which the Federal legislation would directly regulate. These differences go to the methods of regulation, however, rather than to the purpose

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of the regulation or to the completeness of the schemes. But the differences of method do not authorize State action. In *First Nat. Ben. Soc.* v. *Garrison*, 58 F. Supp. 972, 155 F. 2d 522, the District Court said:

> "When Congress exercises its exclusive powers over interstate commerce, the states cannot legislate on the subject, and the situation is covered as much by what is not done by Congress or the Interstate Commerce Commission, as by the regulations it has made, and the State has no power to fill what it may regard as a hiatus left by Congress and the Interstate Commerce Commission."

The fact that the Federal regulations have not been made effective does not result in conferring jurisdiction upon the State. Occupancy of the field by the Federal government is made by legislation, as shown by the following:

> "The federal and state statutes are directed to the same subject—the equipment of locomotives. They operate upon the object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing [fol. 152] upon the construction of the Act delegating the power." See *Napier* v. *Atlantic Coast Line*, 272 U.S. 605, 612-3; 47 S. Ct. 207; 71 L.Ed. 432.
>
> "It is suggested that the States may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the States to quarantine, and that if he does not act there is no invalidity in the state action. Such construction can not be given to the federal statute. The obligation to act without respect to the States is put directly upon the Secretary

of Agriculture whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary. With the federal law in force, state action is illegal and unwarranted." *Oreg.-Washington* v. *Washington*, 270 U.S. 87, 101; 46 S.Ct. 279; 70 L.Ed. 482. (270 U.S. at p. 102-3).

The foregoing cases related to Federal occupancy of a field in which the States could otherwise act within State police powers, but had been excluded by the Federal legislation. As previously pointed out, however, there is a field of *exclusive* Federal regulation in which the State never can act. In this latter field, the following rule is applicable, as stated in the following cases:

"Nothing which is a *direct* burden upon interstate commerce can be imposed by the State without assent of Congress, and . . . the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free." *Brennan* v. *Titusville*, 153 U.S. 299; 14 S.Ct. 829; 38 L.Ed. 719.

"Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity, or by that means of transportation shall be free." *Bowman* v. *Chicago*, supra (125 U.S. p. 485).

"The contention that, in the public interest, the business is one requiring regulation, need not be challenged. But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that the particular commerce shall be free from regulation." *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298, 307, 308; 44 S.Ct. 544.

The relation between the Agricultural Marketing Agreement Act and State regulation has been an issue in two cases, one involving raisins, the other milk. In *Parker* v. *Brown*, supra, the U. S. Supreme Court upheld the regulation of raisin prices paid California producers by California processors, partly because it "applied to trans-

[fol. 153] actions wholly intrastate" (see page 7 of this brief), and partly because of the following circumstances:

> "We have no occasion to decide whether the same conclusion would follow if the state program had not been adopted with the collaboration of officials of the the Department of Agriculture and aided by loans from the Commodity Credit Corporation recommended by the Secretary of Agriculture." (317 U.S. 358-9).

This reservation was pointed out by the Court in *Hood* v. *DuMond supra,* (336 U.S. p. 537).

In *Hood* v. *DuMond,* supra, New York had denied a license to establish a milk receiving plant for export to Massachusetts on the ground that issuance of the license would tend toward destructive competition in the market. The Court held, however, that the State could not require the license for interstate commerce. One of the bases for the Court's decision was the Agricultural Marketing Agreement Act. (See 336 U.S. pp. 541-5). The language is general, but the Court concluded as follows (p. 545):

> "These sections and reports indicate that it is the deliberate policy of Congress to prevent federal officers from placing barriers in the way of the interstate flow of milk. While a statutory prohibition against federal interference with certain phases of it may not always imply that the state too is precluded, it is obvious that a state limitation on export for the benefit of its own *own* consumers is not authorized by this Federal Act. The purpose as expressed in sec. 1, 7 U.S.C. sec. 601, is to avoid conditions which burden and obstruct the normal channels of interstate commerce. The order of the Commissioner avows itself to have the opposite effect. It can claim neither federal sponsorship nor congressional sanction."

In the instant situation, we have State regulation of retail prices asserted in the field of direct movements in interstate commerce, forbidden to the State for the reasons previously explained, and ouster of Federal regu-

lation by the producers with the obvious intention of substitution of the State regulation of interstate commerce. Certainly this situation is contrary to the principles above stated, if for no other reason than that State regulation is being used to frustrate Federal regulation of interstate commerce.

[fol. 154] II

The State Milk Commission Has No Jurisdiction of Interstate Commerce by Reason of Section 3-381 of the Code of Virginia, 1950, but the Holding that the Commission has such Jurisdiction, if Upheld, would render the Regulation of the Milk and Cream Act of Virginia in Violation of the United States Constitution.

The Milk and Cream Act of Virginia contains a "saving clause" on section 3-381 of the 1950 Code of Virginia, as follows:

> "No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except in as far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto."

This saving clause, and the limits of Virginia regulation of milk traffic in the Arlington-Alexandria Market area was the subject of decision of the U.S. Supreme Court in *Highland Farms Dairy* v. *Agnew*, 17 F. Supp. 575; affirmed 300 U.S. 608; 57 S.Ct. 549, 81 L.Ed. 835. The *Highland* case involved a suit to enjoin enforcement of the Virginia Milk and Cream Act and regulations of this Commission in the Arlington-Alexandria Milk Market. "One of the two plaintiffs (Highland Farms Dairy, Incorporated), which will be spoken of as 'Highland', has a cream--y for the pasteurizing and treatment of milk at Washington in the District of Columbia. For that purpose it buys milk from farmers in Virginia and Maryland. Its entire output of bottled milk it sells to the other plaintiff, Luther W. High, who has retail stores in Virginia and elsewhere for the sale of ice cream, milk and other dairy products." "The bottled milk distributed by High in Virginia is sold to him

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in the District of Columbia but is delivered to his Virginia stores by the dairy trucks upon orders received by telephone." (17 F. Supp. 579.) The statute was attacked as in violation of the commerce clause of the U. S. Constitution.

[fol. 155] The following is quoted from the opinion of the 3-judge District Court:

> "Finally, the complainants say that the act and the regulations in pursuance thereof are invalid because they impose a burden on interstate commerce in violation of sections 8 and 10 of article 1 of the Federal Constitution. The argument rests, so far as section 8 is concerned, upon the interpretation of certain provisions of the act to mean that a distributor of milk in an area established by the Commission is forbidden to buy from a distributor located beyond the borders of the state unless the latter shall have first obtained a license from the Commission; and also that the distributor beyond the state, unless licensed, is forbidden to make such a sale; and that if the foreign distributor is licensed, he shall conform to the prices fixed by the Commission and shall comply with its rules and regulations and orders, subject to incurring the penalties prescribed by the act. This interpretation is based upon the definition of 'distributor' in section 1 of the act to include persons, wherever located or operating, whether within or without the Commonwealth of Virginia, and upon the provisions of section 4 that no distributor in a market in which the provisions of the act are in effect shall buy milk from producers or others for sale within the state, or sell milk within the state unless the distributor is duly licensed under the provisions of the act, and providing further, that it shall be unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed as required by the act.
>
> "If the act is given this meaning, it is doubtless invalid as a direct and unconstitutional burden on interstate commerce. In *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511; 55 S.Ct. 497, 79 L.Ed. 1032, 101 A.L.R.

55, the Supreme Court held that a law or regulation of the state of New York was invalid, as a violation of article 1, sec. 8, cl. 3 of the Constitution, which prohibited the sale of milk imported from another state unless the price paid therein to the producer was equal to the minimum prescribed by New York for purchases from local producers. We think that the act does not have the meaning attributed it, although the language of the sections under discussion give some support to the complainants' argument; for when the act is considered as a whole, including the admonition of section 14 that no provision of the act shall be construed to apply to foreign or interstate commerce except in so far as the same may be effective pursuant to the United States Constitution, it is seen that the act was not designed to apply to a distributor beyond the state either as to prices or licenses.

"Section 3 (j) of the act gives the Commission power to establish markets and to fix prices to be paid to producers by distributors, and wholesale and retail prices to be charged by distributors therein. The term 'market' means any city or town of the commonwealth or two or more cities and towns and the surrounding territory designated by the Commission as a natural marketing area. Obviously the area designated is to be confined by the Commission to a territory within the state of Virginia, and consequently the power of the Commission to fix prices in any market is to be enforced only within the state.

"Likewise, section 3 (k) provides that the Commission may require all distributors in any market designated by the Commission to be licensed by the Commission, so that here also the powers of the Commission are restricted to Virginia territory.

"Sections 1 (2) and 4 are broader in their literal sig- [fol. 156] nificance; but when it is borne in mind that the dairy in the instant case is not required by the act to be licensed or to sell at prices fixed by the Commission, since it is located in Washington and is not a distributor in any market designated by the

Commission, it is seen that the act does not forbid High from purchasing milk from the dairy in the District of Columbia, or fix the price which he shall there pay. . . ."

The opinion of the U.S. Supreme Court may be regarded as stronger than that of the District Court (300 U.S. 614-6):

"3. The statute does not lay a burden on interstate commerce.

"Argument to the contrary is built upon the definition of the word 'distributor' contained in sec. 1. We learn from that section that distributors include 'persons wherever located or operating, whether within or without the Commonwealth of Virginia, who purchase, market, or handle milk for resale as fluid milk in the Commonwealth of Virginia.' This definition, we are told, takes in the plaintiff Highland, who buys milk and sells it in interstate commerce, and does so with the expectation that upon arrival in Virginia the milk will be resold. But Highland is not subject to the provisions of the act, and so the Milk Commission has ruled. No matter what the definition of a distributor may be, sales are not affected by any restriction as to price unless made within the boundaries of a designated market area. The sections quoted in the margin point fairly to that conclusion. Highland in Washington may sell to High in Virginia, and High may buy from Highland, at any price they please. Not till the milk is resold in Virginia within a market area will the price minimum apply, and then only to the price to be charged on the resale. Cf. *Wiloil Corp.* v. *Pennsylvania*, 294 U.S. 169, 175; *Sonneborn Bros.* v. *Cureton*, 262 U.S. 506; *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511. If there could be any doubt about this as a matter of construction, the doubt would be dispelled by the administrative practice and by the warning of the statute, expressed in sec. 14, that operations in interstate commerce shall not be deemed to be affected. So also as to the requirement of a license

expressed in sec. 4. High needs a license to the extent that he sells at retail to consumers in Virginia. Highland does not need one, and the Commission is not asking it to apply for one, because its business is now conducted with persons in interstate exclusively. Clumsy draftsmanship may have spread a fog about the section when viewed in isolation or taken from its setting. The fog scatters when we recall the provisions of sec. 14 and the administrative practice. Appellants' fears are visionary."

The sale and movement of milk from the District of Columbia directly to Arlington consumers is the same, so far as principle is involved, as the sale and transportation of milk by Highland to High, and the same interpretation of the same statute should result in the conclusion that the State Milk Commission has no authority or jurisdiction to regulate the movement.

[fol. 157] III

The Court Erred in Holding that the Question at Issue in the Proceeding was Whether the Minimum Price Regulation is a Burden on Interstate Commerce; and Such Regulation is a Burden on Interstate Commerce.

Emphasis of the trial court on whether regulation is a "burden" implies that the Court below followed the theory that a State may impose "reasonable" restrictions upon interstate commerce which would not be unduly burdensome. Such a theory of State power is erroneous, because the rule is not so broad. As the cases cited above show, there is a field of interstate commerce over which the States have no jurisdiction whatsoever. The Highland case itself shows that this is true with respect to milk price regulation in the Arlington area.

On the other hand, if regulation of the direct movement is considered a burden, ipso facto, then the Court also was wrong. The case of *Baldwin & Seelig*, 294 U.S. 511, 55 S.Ct. 497; 101 A.L.R. 55, 79 L.Ed. 1032, shows that the U.S. Supreme Court is of the view, affirmed later in the *Highland case*, that price regulation of milk moving across

State lines is in *itself* a burden on interstate commerce. The following are quotations from that case:

> "Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the States." (p. 522)
>
> "Commerce between the States is burdened unduly when one state regulates by indirection the prices to be paid to producers in another, in the faith that augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product." (p. 524)
>
> "It is one thing for a state to exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets. It is a very different thing to establish a wage scale or scale of prices for use in other states, [fol. 158] and to bar the sale of the products, whether in original packages or in others, unless the scale has been observed." (p. 528)
>
> "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended." (p. 527)
>
> "The statute here in controversy will not survive that test. A dealer in milk buys it in Vermont at

prices there prevailing. He brings it to New York, and is told he may not sell it if he removes it from the can and pours it into bottles. He may not do this for the reason that milk in Vermont is cheaper than milk in New York at the regimented prices, and New York is moved by the desire to protect her inhabitants from the cut prices and other consequences of Vermont competition. To overcome that competition a common incident of ownership—the privilege of sale in convenient receptacles—is denied to one who has bought in interstate commerce. He may not sell on any terms to any one, whether the orders were given in advance or came to him thereafter." (pp. 527-8)

Note how far the court went in the decision, in that the State was not permitted to extend the prohibition against sale even to the milk bottled in the State but still moving in interstate commerce.

[fol. 159] Conclusion

The questions of law raised in the Assignments of Error have never been passed upon by this Honorable Court. The questions involved have a public, as well as a private, importance, and it is submitted that the decision of the lower Court should be reviewed, not alone for the benefit of the complainant who has been aggrieved by the Order of the lower Court, but, also, for the future guidance of public authorities and private individuals in this Commonwealth.

In conclusion it is respectfully submitted that the lower Court has committed reversible error in not applying the proper legal principles to the facts in the case at bar.

For the foregoing reasons, your petitioner prays that an appeal or writ of error may be awarded your petitioner from the decree complained of.

Petitioner adopts this petition as his opening brief.

In conformity with Rule 9 of this court, it is stated that the appellant is the Arlington County Board, plaintiff below, and the appellee or parties of record who will be interested in sustaining decree of the court below, or

affected by a reversal thereof, is the State Milk Commission of Virginia, defendant below.

Your petitioner requests an oral presentation of the petition.

This petition will be filed with the Clerk of the Supreme Court of Appeals at Richmond, and a copy was mailed to the Attorney General of the Commonwealth of Virginia at Richmond, Virginia, opposing counsel in the court below, on the 18th day of November, 1952.

The County Board of Arlington County, Virginia,
(S.) Malcolm D. Miller, By Counsel, Malcolm D. Miller, Attorney, Munsey Bldg., Washington 4, D.C.

[fols. 160-162] Certificate

I, Malcolm D. Miller, an attorney practicing in the Supreme Court of Appeals of Virginia, do certify that in my opinion the decree complained of should be reviewed by said court.

(S.) Malcolm D. Miller, Attorney, Munsey Bldg., Washington 4, D.C.

[fol. 163] In the Supreme Court of Appeals of Virginia

The County Board of Arlington County, Virginia, a body corporate, et al., Complainant,

v.

State Milk Commission, Respondent

Brief of State Milk Commission in Opposition to Petition for Appeal or Writ of Error—Filed November 28, 1952.

Addition to Summary of Facts and Proceedings in the Trial Court

Complainant has correctly stated some of the facts involved in this proceeding but has not stated the important material facts as they appear in the record upon which

the decision must be based. The respondent wishes to add to the statement of facts set out in the petition the following:

The record discloses that Chestnut Farms Dairy sold at wholesale and retail in this market 13.77% of its total sales and sold 33% of the total sales in this area. Chestnut Farms Dairy purchases milk from Virginia, Maryland, West Virginia and some from Pennsylvania. It purchased 46.09% of its total purchases in the State of Virginia. Chestnut Farms Dairy purchased from Virginia 53.45% of all the milk that was purchased in Virginia by all distributors in the Arlington-Alexandria and Manassas market area and the District of Columbia. 28.09% of all its Virginia purchases was sold by Chestnut Farms Dairy in this market area.

[fol. 164] The Virginia milk purchased by Chestnut Farms was processed, along with all other milk purchased, at its plant in the District of Columbia. The milk and other dairy products thus processed were loaded on trucks at its plant in the District of Columbia and sales were made from these trucks in this market area both at wholesale and at retail.

Chestnut Farms operates 15 or 20 truck routes in the Arlington market area. The drivers in charge of the trucks are in reality salesmen and solicitors. These men solicit from door to door and from store to store selling their product. They are paid on a commission basis with a guaranteed minimum salary. When the driver starts out with this truck in the morning he does not know the volume that he will sell that day. He sells to the stores whatever the store manager or store owner elects to buy that day. He usually makes his collections daily from the stores or restaurants and collects from the various doorstep deliveries weekly or monthly. It is the practice of the Chestnut Farms to keep additional trucks ready at the plant to supply the emergency sales made by the various truck driver-solicitors in excess of their truck loads. The driver 'phones in and meets his new supply at an appointed place and the driver-solicitor proceeds from there for his additional sale. True it is that the doorstep home

owner consumer is more regular in his purchases to the extent that there is usually a standing order for one or two quarts, etc., but even these are increased or entirely cut off from time to time by notes or memoranda at the doorstep. The driver solicitor leaves a bill at the doorstep and is paid at the doorstep and keeps his own book of account and records in his truck. It is true that there are some substantial number of individual consumers who send monthly checks direct to Chestnut Farms Dairy in Washington in payment of their milk bills. It is true also that Chestnut Farms Dairy does not have a processing plant or a receiving plant in the State of Virginia or in this market area. For all practical purposes the truck is the [fol. 165] store from which the sales are made and the driver is the solicitor, salesman and store clerk through whom the merchandise is sold and delivered to the consumer or customer and payment made therefor. Approximately 50% of the total milk sold by Chestnut Farms Dairy in this marketing area in Virginia is sold at wholesale and 50% at the doorstep.

In the year 1950 Chestnut Farms Dairy paid an income tax to the State of Virginia in the sum of $16,333.00 on business done in Virginia. In addition it paid for business and store licenses on the trucks the same being in the nature of peddlers licenses the sum of $6,762.00. Items in similar amounts have been paid for many years. The District of Columbia for many years through its taxing authority has recognized this volume of business as done in Virginia and has not taxed that volume as business done in the District of Columbia. The testimony indicates that Thompson's Dairy, the next largest dairy in this area, operates in the same fashion buying 55% of its total milk in Virginia and selling 23% of its total sales in this market area.

The Lucerne Milk Company which is a trade name for the milk division of Safeway Stores receives its milk from shippers in Maryland and Virginia through the Maryland and Virginia Milk Producers' Association at its plant in the District of Columbia. The milk is processed there and packaged. Safeway transports milk from its District plant to its Virginia stores. It sold in this market area

17.09% of its total milk sales in the metropolitan Washington area. It sold 10½% of all Virginia sales and purchased from Virginia producers 15.03% of its total purchases of milk. Its Virginia sales amounted to 116% of its Virginia purchases. Safeway has no milk routes in Virginia but distributes all of its dairy products direct to retail customers coming to its stores. Safeway operates its trucks that deliver the milk from the Washington processing plant to its various stores in Virginia on the same commission basis for the truck driver as route sales-[fol. 166] men and wholesale drivers of other distributors. All of these truck driver salesmen are in the same Union and are employed under the same Union contract as is applicable to the entire milk distributing industry in this area.

Chestnut Farms Chevy Chase Dairy, Thompson's Dairy, Lucerne Milk Commission and the Milk Division of Safeway Stores are the principal distributors who offered testimony in this proceeding. They raised no question of the right of respondent to fix minimum prices nor did they or do they contend that the fixing of a minimum sales price is a burden on them or on interstate commerce.

Questions Involved

Counsel for complainant, Arlington County, argues that the questions involved in this proceeding are:

(a) The authority of the State Milk Commission to regulate the sale price of fluid milk sold and delivered to consumers from trucks of District of Columbia distributors.

(b) Whether or not the fixing of a minimum sale price on fluid milk sold and delivered to consumers in the Arlington County market area is to be determined by the degree of "burden" placed upon interstate commerce.

It is the contention of respondent that there is no question but that the State of Virginia can and has authorized the Milk Commission to regulate the sale price of milk sold under these circumstances and that such a regulation does not place a burden upon interstate commerce.

Further it is the contention of respondent that the sales

in question are Virginia transactions and not transactions in interstate commerce; that even if they were in interstate commerce the fixing of minimum prices is not a burden on interstate commerce; and even if it were the burden is not undue and is still within police power of the state to protect its milk industry in the state by such regulations.

[fol. 167] ***The Sale of Milk by Chestnut Farms Dairy in the Arlington Market Area Is Local and Is Subject to the Control of the Act.***

From the aforegoing facts it is obvious that all the sales of Chestnut Farms Dairy are local in Virginia, whether made to wholesale or retail customers. It is interesting to observe that while counsel for the Arlington County Board of Commissioners could have contended and did originally contend that both types of sales were in Interstate Commerce, he has in his latest memorandum not done so with respect to wholesale sales. He now confines his thesis to the contention that the transportation and sale from trucks of distributors in the District of Columbia to door steps of *consumers* in Arlington is in Interstate Commerce and therefore the Virginia Milk Commission has no authority to fix a minimum resale price therefor. Just why sales by distributors to wholesalers should not be in Interstate Commerce while sales to consumers under identical same circumstances should be in Interstate Commerce is not clear. Counsel gives no explanation for the alleged difference.

On this point it would seem that the case of *Wagner* vs. *Covington* 251 U. S. 101, should be more than controlling. Plaintiffs, manufacturers of soft drinks in Cincinnati, Ohio, sold in Covington, Kentucky, from their vehicle to various purchasers such soft drinks as the purchasers might need from time to time. The trucks carried sufficient drinks to meet the probable demands of customers but with the exception of occasional small amounts carried for delivery in response to particular orders previously received at plaintiffs' plant of business in Cincinnati, all of the sales in Covington were made from the vehicle by the driver. Sometimes the driver sold his entire supply

or only a part of it. The sales were made in the bottles as filled in Ohio. The driver collected cash from time to time from his customers. The statement of facts in this case are almost identical with the testimony in the case at bar. In upholding the right of the City of Covington to tax the plaintiff and to recover license fees from them under cer- [fol. 168] tain city ordinances the Court said:

> "If in respect to this portion of their business, plaintiffs may be subjected to the regulatory power of the state acting through the municipality, we are not concerned with the question whether the general language of the ordinances, if applied with respect to some other method of dealing with goods brought from state to state might be repugnant to the Federal Constitution.
>
> "From the facts recited it is evident that, in essence, that part of plaintiffs' business which is subjected to regulation is the business of itinerant vendor or peddler,—a travelling from place to place within the state, selling goods that are carried about with the seller for the purpose. * * *
>
> "Of course, the transportation of plaintiffs' goods across the state line is of itself Interstate Commerce; but it is not this that is taxed by the City of Covington, nor is such Commerce a part of the business that is taxed, or anything more than a preparation for *goods might just as well been manufactured within* it. *So far as the itinerant vending is concerned, the the State of Kentucky;* to the extent that plaintiffs dispose of their goods in that kind of sales, they made them the subject of local commerce, and this being so, they can claim no immunity from local regulation, whether the goods remain in original packages or not."

Apropos of the emphasis supplied above, it might be observed that this Chestnut Farms Dairy milk was bought from Virginia producers in excess of the amounts so sold in Virginia.

The case of *Caskey Baking Company, Inc.* vs. *Commonwealth of Virginia,* 313 U. S. 117, decides the same ques-

tion with respect to bread brought from West Virginia bakeries and sold in the State of Virginia.

It must be remembered that in the record before this Commission the Chestnut Farms Dairy takes out a peddlers or store license on every one of its trucks that operates these truck routes in Virginia and paid in such license fees on those trucks a sum in excess of $6,000.00 in the year 1950. How then could Chestnut Farms Dairy contend in one breath that it was engaged in retail selling from trucks licensed under store licenses and in the next moment contend that it was engaged in Interstate Commerce as to that milk so sold. Chestnut Farms Dairy pays to Arlington County and to Alexandria County each $150.00 peddlers (or store) license fee per year per truck. [fol. 169] *Does it not seem to be the height of inconsistency for Arlington County to contend that it is collecting those license fees illegally by arguing that these trucks are engaged in selling in Interstate Commerce.*

Does the Processing and Bottling of Virginia Milk Outside of Virginia for Sale and Delivery in Virginia Create Interstate Commerce.

Chestnut Farms purchased from Virginia Producers 46% of its total milk supply. It sold in Virginia 28.09% of its Virginia purchases. It must be obvious that Chestnut Farms merely processes in bottles in the District of Columbia about half of its Virginia purchases and returns the milk to Virginia for sale. Suppose that Alexandria Dairy, a dairy under the jurisdiction of respondent, which purchases all its milk from Virginia producers and sells all of its milk in Virginia, merely transported from a receiving station in Virginia a substantial portion of its milk supply to a processing and bottling plant in the District of Columbia and returned it in its own trucks to Virginia, could it then be contended that Alexandria Dairy is engaged in Interstate Commerce and would not be bound by the minimum price provision. Could it be argued for a moment, that by so doing, Alexandria Dairy could relieve itself of its obligations to comply with the Virginia milk statute and the decisions of this Commission? To ask the question is to answer it. Obvi-

ously it could not. It is difficult to see how Chestnut Farms or any other distributor can avoid the jurisdiction of the Milk Commission in view of the foregoing statistics.

What of Highland Farms Dairy vs. *Agnew* *300 U. S. 608?*

Counsel for the Arlington County Board seems to ignore almost entirely the real meaning of the decision of the United States Supreme Court in *Highland Farms Dairy* vs. *Agnew*, 300 U. S. 608, in which decision the Court upheld in toto the Milk Commission Act of Virginia, the same be-[fol. 170] ing Chapter 17 Article 2 Code of Virginia. This Act is almost identical, certainly so far as the fixing of minimum and maximum resale prices is concerned, with the Acts of New York, Pennsylvania and various other forward looking States, all of which have been sustained by the Supreme Court of the United States and will be referred to later.

The Act creating the Milk Commission for Virginia defines "distributor" with an additional definition than that referred to in the Agnew case as follows:

> "Distributor means any of the following persons engaged in the business of distributing, marketing *or in any manner handling fluid milk*, in whole or in part in fluid form for consumption in this State:
>
> I. Persons, irrespective of whether any such person is a producer:
>
> (a) who pasteurize or bottle milk or processed milk into fluid milk.
>
> (b) who sell or market fluid milk at wholesale or retail,
>
> (1) to hotels, restaurants, stores or other establishments for consumption on the premises,
>
> (2) to stores or other establishments for resale,
>
> (3) to *consumers.*"

The Act then provides that distributors shall be licensed. These D. C. distributors are so licensed. The Act then provides that maximum and minimum prices are to be fixed

by the Commission with which all distributors must comply.

In *considering this statute the Supreme Court* of the United States in affirming the District Court of the United States for the Eastern District of Virginia in 300 U. S. 614 said:

> "The Statute does not lay a burden on interstate commerce."

[fol. 171] The contention made by appellants as to the meaning of the word "distributor" in that case is then answered. The definition of the word distributor discussed in the opinion is the second paragraph of the definition and not the one cited above. In the *Agnew* case it was agreed that Highland in the District of Columbia bought milk and sold in interstate commerce. He sold it to a man by the name of High who resold it in Virginia and thus became a distributor. The Court very appropriately said:

> "Highland in Washington may sell to High in Virginia and High may buy from Highland at any price they please. Not till the milk is resold in Virginia within a market area will the price minimum apply, and then only to the price to be charged on resale (the Court citing among other cases, *Baldwin* vs. *G.A.F. Seelig*, 294 U.S. 511, which will be referred to later)."

Counsel in his memorandum before the lower Court then comments on this decision as follows:

> "There is no essential difference between Highland and High and between the Thompson Dairy (likewise Chestnut Farms) and the writer of this brief who receives their milk at his doorstep."

The writer is completely in error. The writer of the brief is a consumer. High in the *Agnew* case was a distributor. Highland was admittedly in interstate commerce. The purchase and sale was by High, a distributor, from Highland also a distributor in the District of Columbia. The more apt comparison the writer could have made would

have been to have compared the *Agnew* case to Safeway, which purchases and processes its milk in the District of Columbia as the Lucerne Milk Company and delivers and sells its milk through its stores in Virginia. Counsel seems to concede that Safeway's operation comes within the Virginia Statute.

The *Agnew* opinion then goes on to say at page 614 and 615:

> "No matter what the definition of a distributor may be, sales are not affected by any restriction as to price unless made within the boundaries of a designated market area."

Why is it that counsel concedes that sales made by Chestnut Farms and Thompson's trucks to stores and restaurants (which trucks carry a peddler's or store licenses) [fol. 172] are within the jurisdiction of the Commission, but sales made from the same trucks to consumers are not within its jurisdiction? The evidence shows that the sales are made under identically the same conditions. Certainly milk delivered to a restaurant in fluid form is delivered "for consumption" in the State. Is there any difference between the consumer on the doorstep and the consumer in the restaurant? Of course, a restaurant too is a consumer as well.

Counsel in his petition and memorandum seems to have overlooked entirely the decision of the highest Court of the State of Virginia upholding the price fixing provision of this Act. In *Reynolds* vs. *Milk Commission*, 163 Virginia 957, the Supreme Court of Appeals passed upon the validity of this statute in a case in which it was sought to enjoin the distributors from selling milk at a price lower than the prescribed minimum. Commenting upon that decision the Supreme Court said in the *Agnew* case page 613 "*a judgment by the highest Court of a State as to the meaning and effect of its own constitution is decisive and controlling everywhere*".

The decision of the Supreme Court of the United States in the case of *Nebbia* vs. *New York*, 291 U. S. 502-559 sustaining the New York Milk Law on all constitutional points

in 1933 would seem to be a total and complete answer to the contention of counsel in his memorandum. The New York law was promulgated by the Legislature of New York after a long investigation into the industry from every standpoint. The entire question of its constitutionality so far as the police power of the State to control the industry was concerned, the production and importation of milk into the State of New York, the fixing of minimum prices was squarely presented.

It is impossible in this memorandum to quote the various paragraphs in the *Nebbia* case that completely answer counsel's contention. The New York Milk Act was the forerunner of all similar Milk Control Acts thereafter passed in many of the Eastern States. Every constitu- [fol. 173] tional objection including the interstate commerce question was raised in that case. That Act provided for minimum resale prices of which complaint is made here. In one sentence 291 U.S. at page 537 the Supreme Court of the United States completely answer counsel's contention:

> "But there can be no doubt that upon appropriate action and by appropriate measures the State may regulate a business in any of its aspects including the prices to be charged for the products or commodities it sells." * * *
>
> Page 538
>
> "Where the public interest was deemed to require the fixing of minimum prices that expedient has been sustained. If the lawmaking body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumers' interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portent the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public.

> And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, *is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt,* and hence an unnecessary and unwarranted interference with individual liberty."

The *Nebbia* case holds that it is within the police power of a state to protect its milk industry from price-cutting and evil trade practices in order that producers, distributors and consumers might have an adequate supply of wholesome milk at a price that will insure continued and adequate production. The action of the Milk Board in fixing a minimum retail price for all milk is in no way [fol. 174] discriminatory or irrelevant to the policy of such legislation. If so-called "interstate commerce milk" could be brought in from other states and sold on a cut-price basis in Virginia, the state would soon become a dumping ground for surplus milk at various seasons, the whole price structure would be destroyed and the legislature of Virginia would be wholly unable to protect the very industry that the *Nebbia* case says it has a right to protect.

Mr. Justice Jackson of the Supreme Court of the United States in the majority opinion in *Hood* vs. *DuMond,* 336 U.S. 529 referring to the *Nebbia* case says:

> "Production and distribution of milk are so intimately related to public health and welfare that the need for regulation to protect those interests has long been recognized and is, from a Constitutional standpoint hardly controversial. Also the economy of the industry is so eccentric that economic controls have been found at once necessary and difficult. These have involved, detailed, intricate and comprehensive regulations, including price fixing."

The Fixing of Minimum Sale Prices Is Not a Burden on Interstate Commerce Because not Undue or Discriminatory.

In the memorandum of counsel there are cited many cases that are entirely appropriate in their setting but many of them state principles with respect to so-called regulations of interstate commerce that have long since been outmoded. Many of the cases on the subject have used the words, "restraints", "obstructions", "in commerce", "on commerce", "burdens", "direct burdens", "undue burdens", "unreasonable burdens", "unfair burdens", "incidental burdens", but such words have almost always been used as the opinions show to aid the Court in trying to balance the right of a State to regulate a business such as the milk industry under its police power and at the same time not to discriminate against interstate commerce in that same industry. *There is no question but that a State may appropriately place some burden* [fol. 175] *upon interstate commerce.* There is no case in the books which is a better illustration of this fact than the Supreme Court decision in *Milk Control Board* vs. *Eisenberg Farm Products,* 306 U.S. 349-351.

In that case the Pennsylvania Milk Control Law required a State license of all persons who handled or purchased milk within the Commonwealth for sale *within or without* the Commonwealth. It required all dealers, interstate and intrastate, to keep records and to give bonds for payment to producers. Dealers who sold milk within or without the State were required to pay state-fixed prices. The purpose was the protection of milk farmers in Pennsylvania from what were deemed to be the evils of cutthroat competition. The law was applied against Eisenberg who handled and operated a milk receiving plant in Pennsylvania where the milk was weighed, tested and cooled preparatory to shipment to New York. Unquestionably Eisenberg was engaged in interstate commerce. *Without doubt the requirements imposed upon Eisenberg were not only burdens but very great and substantial burdens. What greater burden could there be upon him than that he should pay for his purchase a price fixed by the*

State. Certainly there was no free right of purchase and sale and no bargaining.

In passing one must wonder how counsel can distinguish between the right of the State to fix a universal purchase price in local and interstate commerce and the fixing of a universal minimum sale price for the same kind of commerce.

In upholding the legality of the Pennsylvania Statute the Supreme Court of the United States in 306 U.S. at page 350 said,

> "The Respondent contends that the Act, if construed to require it to obtain a license, to file a bond for the protection of producers, and to pay the farmers the price prescribed by the Board, unconstitutionally regulates and burdens interstate commerce. The State Supreme Court has held that the Statute is a valid police regulation. The Petitioner concedes that the purchase, shipment into another State, and sale there of the milk in which the Respondent deals, is [fol. 176] interstate commerce. The question for decision is whether, in the absence of Federal Regulation the enforcement of the Statute is prohibited by Article I, paragraph 8 of the Constitution. *We hold that it is not.* * * *
>
> "Every State Police Statute necessarily will affect interstate commerce in some degree, but such a Statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce."

Only by a complete reading of the entire opinion can one gauge the full meaning thereof. The opinion, however, justifies the argument that States can impose burdens in interstate commerce, particularly where such burdens are not discriminatory, and where, as the Court said in the Eisenberg case *"the activity affected by the regulation is essentially local"*. The Eisenberg case may not be dismissed as simply as counsel seeks to do in his memorandum. It would seem to be more than controlling here.

We are not alone in this comment with respect to the Eisenberg case. Mr. Justice Black of the Supreme Court

in his dissent in the case of *Hood* vs. *DuMond*, 336 U.S. 558 commented on the Eisenberg case as follows,

> "The Eisenberg case thus sustained the power of a State to require licenses from interstate dealers and to impose conditions on their interstate commerce transactions in order to *effectuate legitimate State policy*. And the conditions Pennsylvania imposed were burdensome, as this Court recognized they erected obstacles which were bound to limit the number of interstate dealers. * * *
>
> "Pennsylvania imposed these burdens on interstate commerce to promote health and to protect its farmers from the consequences of destructive competition among dealers."

Counsel for Arlington County seems to rely very heavily upon the ideas expressed in the case of *Baldwin* vs. *Seelig*, 294 U.S. 511-528. This case when studied and analyzed is so different from the case at bar that one cannot help but wonder why it was referred to at all. It establishes principles which decide the contention of counsel against him. The crucial facts of that case are as follows:

The New York law fixes a minimum price for milk bought [fol. 177] by New York dealers from New York farmers. Vermont's legislative policy left milk dealers free to fix milk prices by bargaining. Seelig, a New York dealer, sold milk in New York which had been bought from Vermont farmers at prices below that fixed for New York farmers by New York law. The New York Milk Control Act with the aid of regulations made thereunder set up a system of minimum prices to be paid by dealers to producers. The Act had a provision whereby the protective prices to be paid to New York farmers were extended to that part of the supply which comes from other States. It provided that there should be no sale within New York of milk bought outside the State unless the price paid to the purchasers was one that would be lawful upon a like transaction within the State. The Supreme Court of the United States in holding that the Milk Control Act was invalid to this extent said,

"New York has no power to project its legislation into Vermont by regulating the price to be paid in that State for milk acquired there. New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. Accepting these postulates New York asserts her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers of Vermont is less than would be owing in like circumstances to farmers in New York. The importer in that view may keep his milk or drink it, but sell it he may not.

"Such a power, if exerted, will set a barrier to traffic between one State and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported."

The real meaning of *Baldwin* vs. *Seelig* is again found in Mr. Justice Black's dissent in *Hood* vs. *DuMond*, 336 U.S. 556 as follows,

"Even though the Court regarded the Baldwin vs. Seelig law as discriminatory, other considerations were added to weight the scales on the side of invalidation. Its impact on Vermont economy and Vermont legislative power was weighed. To whatever extent it is desirable to reform the economic standards of Vermont, "the legislature of Vermont and not that of New York must supply the fitting remedy." • • •

"Added to this was the Court's appraisal of the law *as a plain discrimination against interstate commerce* [fol. 178] *that would inescapably erect a barrier* to suppress competitive sales of Vermont milk in New York, thus leading to retaliatory "rivalries and reprisals," at page 522."

It must be remembered that in the case at bar Virginia has not attempted to regulate the price of milk in the District of Columbia or the manner in which it is distributed there. It has not attempted to put pressure on the District of Columbia (Chestnut Farms Dairy and others

similarly situated) to reform economic standards; its law is not hostile to interstate commerce in conception or operation; *its purpose in fixing minimum resale prices is to conserve health and promote economic stability among Virginia producers.* The Virginia minimum price requirement fairly administered to all distributors as it has been is not the kind that breeds rivalries and reprisals.

Counsel in his memorandum cites the case of *Hood* vs. *DuMond,* 336 U.S. 525-576. This case is no authority for counsel's contention. In that case Hood and Sons, a Massachusetts corporation, distributed its milk products in Boston acquiring the bulk thereof outside of Massachusetts. Two receiving stations were owned in New York State near Troy. Hood wished a permit from the New York Milk Commission for another receiving station. The station would be nearer some producers already shipping to one of Hood's stations and would also attract a number of producers who would be diverted from other buyers. Permit was denied primarily on the ground that if Hood took producers delivering milk to the local markets such as Troy, it would deprive those markets of an adequate supply especially during the short season. The Supreme Court denied the right of the Milk Commission of New York to refuse Hood an additional permit on the ground that it was a discrimination against Interstate Commerce and that the state had no right to totally prohibit the right of Hood to purchase from additional producers in New York State merely because the milk would be transported to Boston in Interstate Commerce.

[fol. 179] This case is wholly different from the one at bar and is different also from the case of Baldwin against Seelig 294 U.S. 511 quoted above. In the Seelig case the exporter was not prohibited from acquiring new stations, or new producers. He merely was required to be treated and to treat others on an equal basis. In the Hood case, Hood was denied any access to a new market in New York because of his interstate activities.

Be it noted that the application of the minimum sale price in Virginia is equal and universal as to all milk received by wholesaler, retailer or consumer in their respective classifications in Virginia. There is no discrimination;

there is no exclusion or limitation; there is no ground or basis for retaliation; the market is open to all alike.

Some quotations from Mr. Justice Jackson's opinion in the case of *Hood* vs. *DuMond* are in order:

> Page 530.
> "It is only additional restrictions, imposed for the avowed purpose and with the practical effect of curtailing the *volume* of interstate commerce to aid local economic interests, that are in question here, and no such measures were attempted or such ends sought to be served in the Act before the Court in the Eisenberg Case."

Referring to the Seelig Case:

> "In that case, New York placed conditions and limitations on the local sale of milk imported from Vermont designed in practical effect to *exclude* it, while here its order proposes to limit the local facilities for purchase of additional milk so as to withhold milk from export. The State agreed then, as now, that the Commerce Clause prohibits it from *directly curtailing movement* of milk into or out of the State."

Referring to various decisions in the Supreme Court on the milk industry, Mr. Justice Jackson at page 531 said of the Court:

> "It recognized, as do we, broad power in the State to protect its inhabitants against perils to health or safety, fraudulent traders and highway hazards, even by use of measures which bear adversely upon interstate commerce. But it laid repeated emphasis [fol. 180] upon the principle *that the State may not promote its own economic advantages by curtailment or burdening of* interstate commerce."

The test repeatedly applied by Mr. Justice Jackson in this case is that a state may not retard, burden or constrict the flow of interstate commerce *for its economic advantage,* and may not place itself in a position of economic isolation. Finally, the Court at page 539 lays

down the principle that would seem to apply in all such cases and ought to be a complete answer to counsel's contention in the case at bar.

> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs, duties, or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any."

State Minimum Price Laws Must Be Obeyed by the United States Government

We cite with some interest the case of *Milk Control Board* vs. *Goselin's Dairy* (1938) 16 N.E. (2nd) 641 where it was held that prices established by order of a Milk Control Board by virtue of a statute empowering such Board to fix prices were applicable to contracts made for the sale of milk to the United States Government for delivery at a Veteran's hospital within the state. Obviously, all that was done was merely to deliver the milk to a Government hospital within the state. In holding that the Act was applicable in so far as minimum prices were concerned the Court said:

> "The purpose is obviously to control in its entirety the business of selling milk within the commonwealth. Any discrimination between sales in this commonwealth to residents and sales to non-residents such as visitors or foreign corporations doing business here would be wholly artificial and unrelated to the objects of the act, and would open the door to evasions which would tend to defeat its purposes."

[fol. 181] A similar decision in even stronger language is to be found in *Patterson Milk and Cream* vs. *Milk Control Board,* 118 N. J. L. 383. A milk dealer's license was revoked because he sold milk to the United States Govern-

ment at prices below those fixed by the state Milk Control Board in New Jersey.

It will be seen from these cases that the United States engaged in interstate commerce, having sovereign control of interstate commerce must obey a state's minimum price law. How much more must it be true that an individual business similarly situated must do so.

Conclusion

Counsel for the County Board in his paragraph marked "Conclusion" says "The questions of law raised in the Assignments of Error have never been passed upon by this Honorable Court." It is difficult to understand how counsel can make such a statement in the face of the fact that this Court decided the case of *Reynolds* v. *The Milk Commission*, 163 Va. 957 and in the decision also of this Court in *Highland Farms Dairy* vs. *Agnew*, 300 U.S. 608, affirming a decision of this Court. Contrary to the statement of counsel all of the questions that he raises have been decided by the Supreme Court of the United States and the highest Courts in Virginia, New York, Pennsylvania, Massachusetts and in almost every other state where the marketing of milk has become such a serious problem to our economy.

Increasing economic complexities, greater demands for governmental supervision, keener competition and the increasing exercise of the latent power of the legislature in reference to industries and conditions that safeguard the public interest has made it clear that the old guideposts of earlier decisions with respect to burdens or interferences with interstate commerce have been repainted and their direction has been changed. Especially has this [fol. 182] been true in the milk industry starting with the celebrated case of *Nebbia* vs. *New York*, 291 U.S. 502. The inherent police power of a state has few fixed limitations. Even those limitations will expand to meet the actual requirements of an advancing civilization and adjust themselves to the necessities of our multiplying complexities in our economic life. The acid test between the Interstate Commerce Clause and State Regulation by virtue of its

police power is whether or not there is discrimination, exclusion or basis for retaliation. The Virginia minimum price regulation applied equally to all under such circumstances is not a burden or even a hindrance to interstate commerce.

Respectfully submitted, (S.) J. Lindsay Almond, Jr., Attorney General of the Commonwealth of Virginia, Thomas M. Miller, Assistant Attorney General, Roger J. Whiteford, Special Assistant to the Attorney General.

Certificate of Service (omitted in printing).

[fol. 183] IN THE SUPREME COURT OF APPEALS IN THE CITY OF RICHMOND

The Court-Library Building

ORDER REFUSING APPEAL—January 26, 1953

The petition of The County Board of Arlington County, Virginia, for an appeal from a decree entered by the Circuit Court of the City of Richmond on the 22nd day of July, 1952, in a certain proceeding then therein depending, wherein the said petitioner was plaintiff and State Milk Commission was defendant, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the said decree is plainly right, doth reject said petition and refuse said appeal, the effect of which is to affirm the decree of the said circuit court.

Clerk.

[fol. 184] IN THE SUPREME COURT OF APPEALS IN THE CITY OF RICHMOND

Supreme Court of Appeals Building

[Title omitted]

ORDER REFUSING TO ALLOW AN APPEAL TO THE SUPREME COURT OF THE UNITED STATES—April 21, 1953

The petition of The County Board of Arlington County for an appeal to the Supreme Court of the United States from an order entered by this court on the 26th day of January, 1953, in a certain cause then therein depending wherein the said petitioner was appellant and the State Milk Commission was appellee, having been maturely considered, the court doth reject said petition and refuse said appeal to the Supreme Court of the United States.

Clerk.

[fol. 185] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF APPEAL—April 22, 1953

To: The State Milk Commission of the Commonwealth of Virginia, represented by The Attorney General of the Commonwealth of Virginia.

Please take notice that, pursuant to the statutes and rules of Court in such case made and provided, the above-named complainant-appellant, the Arlington County Board does hereby appeal to the Supreme Court of the United States from the final order and judgment of the Supreme Court of Appeals of the Commonwealth of Virginia, made and entered on January 26, 1953, which affirmed the decree of the Circuit Court of the City of Richmond, Virginia, entered on July 22, 1952, and held that said decree was "plainly right" that "the State Milk Commission can legally fix the minimum sale price of

fluid milk sold and delivered to consumers in the Arlington-Alexandria Market Area from trucks of the District of Columbia distributors and that Arlin-ton-Alexandria Market Order No. 4 should be sustained"; and "that the minimum price regulation in question is not a burden on interstate commerce."

For The Arlington County Board, Appellant, (S.) Malcolm D. Miller, Attorney, Munsey Building, Washington 4, D. C.

Dated: April 22, 1953.

[fol. 186] In the Supreme Court of the United States

[Title omitted]

Petition for Appeal—April 22, 1953

To: The Honorable Supreme Court of the United States:

The above-named complainant-appellant, the Arlington County Board, a body corporate which is the governing body of Arlington County, Virginia, considering it aggrieved by the final decree and judgment of the Supreme Court of Appeals of the Commonwealth of Virginia, entered on January 26, 1953, does hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said complainant-appellant; and that a transcript of the record, proceedings, and papers (or so far as the Court may direct, the original record in lieu of such transcript) upon which said decree is based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such cases provided.

On April 20, 1953, the undersigned presented a like petition for appeal to the Chief Justice of the Supreme Court of Appeals of Virginia, but allowance of appeal was re-

fused by that Court. Therefore the petition is respectfully submitted to the Supreme Court of the United States.

Respectfully submitted, For The Arlington County Board, Complainant-Appellant, By (S.) Malcolm D. Miller, Attorney, Munsey Building, Washington 4, D. C.

Dated: April 22, 1953.

[fol. 187] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—April 23, 1953

The Arlington County Board, having made and filed its petition praying for an appeal to the Supreme Court of the United States from the final decree and judgment of the Supreme Court of Appeals of the Commonwealth of Virginia in this cause entered on January 26, 1953, and from each and every part thereof, and having presented their assignment of errors and prayer for reversal and their statement as to the jurisdiction of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $250.00 with good and sufficient surety, and shall be conditioned as may be required by law.

It is further ordered that citation shall issue in accordance with law.

(S.) Fred M. Vinson, Chief Justice.

Dated: April 23, 1953.

[fol. 188] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—
April 22, 1953

The Arlington County Board, complainant-appellant in the above-entitled cause, in connection with its appeal to the Supreme Court of the United States, hereby files the following assignment of errors upon which it will rely in its prosecution of said appeal from the final judgment of the Supreme Court of Appeals of Virginia entered on January 26, 1953.

The Supreme Court of Appeals of Virginia erred:

1. In affirming the decree of the Court below entered on July 22, 1952, by the Circuit Court of the City of Richmond, Virginia, and in refusing an appeal from such decree by which the said Circuit Court upheld the validity of an order of the State Milk Commission of the Commonwealth of Virginia increasing prices of milk in Arlington-Alexandria Market Order No. 4 which was the subject of that proceeding.

2. In holding that the said Circuit Court was "plainly right" in its decree and in its letter-opinion under date of June 20, 1952, in which the said Circuit Court held "that the State Milk Commission can legally fix the minimum sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market Area from trucks of the District of Columbia distributors and that Arlington-Alexandria Market Order No. 4 should be sustained."

3. In holding that the said Circuit Court was "plainly right" in said decree and in said opinion in which the Circuit Court held "that the minimum price regulation in question is not a burden on interstate commerce."

[fol. 189] 4. In failing to grant an appeal and hold that the said order of the State Milk Commission was in violation of the Commerce Clause of the United States Constitution (Article 1, Section 8, Clause 3); and, hence that said order of the State Milk Commission was beyond its jurisdiction.

5. In failing to grant an appeal and hold that the field of milk price regulation in the Arlington-Alexandria Market Area, under said Commerce Clause of the United States Constitution, had been occupied by the United States Government under an Act of Congress (7 U. S. Code, sec. 601 et seq. particularly section 608 (c)) to the exclusion of regulatory jurisdiction by the State Milk Commission of the Commonwealth of Virginia in said area.

Wherefore, complainant-appellant, the Arlington County Board, prays that the final decree of the Supreme Court of Appeals of the Commonwealth of Virginia be reversed, and for such other relief as the Court may deem fit and proper.

For The Arlington County Board, Complainant-Appellant, (S.) Malcolm D. Miller, Attorney, Munsey Building, Washington 4, D. C.

Dated: April 22, 1953.

[fol. 190] Citation in usual form showing service omitted in printing.

[fol. 191] Statement required by Paragraph 2 Rule 12 of the Rules of the Supreme Court (omitted in printing).

[fols. 192-198] Praecipe (omitted in printing).

[fol. 199] Clerk's Certificate to foregoing transcript omitted in printing.

Judge's certificate to clerk (omitted in printing).

[fols. 200-202] IN THE SUPREME COURT OF THE UNITED STATES

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, a body corporate, ET ALS., Appellant,

v.

STATE MILK COMMISSION, Appellee

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—filed June 16, 1953.

1. Appellant adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of errors heretofore filed.

2. Appellant designates the entire record, as filed in the above-entitled case, for printing by the Clerk of this Court.

(S.) Malcolm D. Miller, Attorney for Appellant, Munsey Building, Washington 4, D.C.

Certificate of Service (omitted in printing).

(File endorsement omitted.)

[fol. 203] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 128

ORDER NOTING PROBABLE JURISDICTION—October 12, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the summary docket and assigned for argument immediately following No. 115, Kern-Limerick, Inc., et al. vs. Parker, Commissioner of Revenue.

The Chief Justice took no part in the consideration or decison of this question.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 128

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, A BODY CORPORATE, ET AL.,
Appellants,

vs.

STATE MILK COMMISSION

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, appellants, The Arlington County Board, submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of Appeals of Virginia entered in this cause.

Opinion Below

No opinion was written by the Virginia Supreme Court of Appeals, but it "refused" an appeal from the court below by an order which expressly "affirmed" the decree of the Circuit Court of the City of Richmond, Virginia; and ex-

pressly stated that the decree below was "plainly right". A copy of such order is attached hereto as Appendix A-1.

The letter-opinion of the Circuit Court of the City of Richmond dated June 20, 1953, is not reported but is attached as Appendix A-2. A copy is attached together with a copy of an interlocutory letter-opinion of September 26, 1951, attached as Appendix A-3.

Jurisdiction

The judgment of the Supreme Court of Appeals of Virginia was entered on January 26, 1953, a copy of which is attached. A petition for appeal was presented to the Supreme Court of Appeals of Virginia on April 20, 1953.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U. S. Code, Section 1257.

As this appeal challenges State court decisions upholding the validity of a legislative order of the Virginia State Milk Commission, prescribing milk prices, as described below; hence the following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case, upon the ground of violation of the U. S. Constitution, *Lake Erie & W. R. R. Co.* v. *Pub. Util. Comm.*, 249 U. S. 422, 424; *Live Oak Assn.* v. *R. R. Comm.*, 269 U. S. 354, 356; *Hamilton* v. *Regents*, 293 U. S. 245, 257-8. The "validity" of a State statute is sustained by State courts, for the jurisdictional purposes of Section 1257, when held applicable to a particular set of facts as against the contention tht such application is in violation of the Commerce Clause of the U. S. Constitution. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 287-290.

Question Presented

Where an order of the Virginia State Milk Commission fixes minimum milk prices under State statute, for milk

sold to consumers in Arlington County, Virginia, by District of Columbia distributors who transport such milk by trucks directly from their processing plants in the District of Columbia to the consumers in Arlington County; is such price-fixing order, and its application to such sales, in violation of the Commerce Clause of the United States Constitution and contrary to the occupancy of the field under provisions of the Federal Marketing Agreement Act of 1937, as amended, Title 7, U. S. Code, sections 601 et seq., particularly section 608 (c).

Statutes Involved

1. Sections 3-359 and 3-381 of the Virginia Milk and Cream Act, as amended, 1950 Code of Virginia, as set forth in Appendix B hereof; and which are part of what is known as the Virginia Milk and Cream Act.

2. Sections 601, 608 (c) (1) and (5) (A) and (B), as set forth in Appendix C hereof; and which are part of what is known as the Federal Marketing Agreement Act of 1937.

Order of Virginia State Milk Commission

The order of the Virginia State Milk Commission at issue is Arlington-Alexandria Market-Order No. 4, issued January 17, 1951, effective January 21, 1951. It is simply a list or schedule of prices of milk and cream. This price list amended prior price lists by increasing milk prices by one-half cent per quart. As the State Milk Commission has contended throughout these proceedings that the prices are applicable to sales of District of Columbia distributors, there is no issue as to the terms of the order, but rather as to whether the Milk Commission had jurisdiction to issue it for such commerce; and there is no purpose in reproducing it as part of this statement. It is of record, of course.

Statement

This controversy was precipitated by the above-described Order No. 4 of the State Milk Commission, issued on January 17, 1951, effective January 21, 1951, unexpectedly increasing retail prices for milk delivered in Arlington by District of Columbia distributors, following a hearing which had not covered this subject.

Using the statutory procedure for judicial review under the Milk and Cream Act, the Arlington County Board and its members filed a petition for appeal in the Circuit Court of the City of Richmond, Virginia, contending that most of the milk purchased from District of Columbia distributors, by Arlington consumers, was moving in interstate commerce, and that the Virginia Milk Commission had no jurisdiction to regulate prices of such milk moving in interstate commerce by reason of the following provision of the Milk and Cream Act (section 3-381):

> "No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto."

Not only was the contention made that the State Milk Commission had no authority because of the Commerce Clause of the U. S. Constitution, but also that the regulation was not in conformity with the Federal Agricultural Marketing Agreement Act of 1937, which also provides for regulation of some milk prices. Annexed to the petition filed in the Circuit Court of the City of Richmond were certified copies of orders of the U. S. Secretary of Agriculture, which had established minimum price regulation of farmer-producer prices in the Washington area, which included Arlington, on November 3, 1945. Federal regulation of such prices ended in March 1947, as a result of a vote of the farmer-

producers in accordance with section 608 (c)(5)(Bi), Title 7, U. S. Code. (10 F. R. 13581 and 12 F. R. 2078)

A hearing was held by the Circuit Court of the City of Richmond, following which the matter was remanded to the State Milk Commission for further hearing as to facts in regard to the question of milk moving in interstate commerce. See letter opinion of September 26, 1951, attached in Appendix A.

A further hearing was held by the State Milk Commission on October 10, 1951. It was attended by representatives of Arlington County, the State Milk Commission, the producers, and the distributors located in both Virginia and the District of Columbia. It is of interest to note that for convenience the hearing was held in the District of Columbia. Most of the facts were given by the two leading District of Columbia distributors and by the State Milk Commission. However, the distributors and producers have not formally intervened in the court proceedings. Afterwards, the State Milk Commission received memorandum briefs, but certified the record to the Circuit Court without changing the order.

On this record at the hearing, the State Milk Commission announced its interpretation as to the scope of its authority and the application of the price-fixing order, as follows:

> "The regulations for the Arlington-Alexandria market area have been filed as part of these proceedings. They of course speak for themselves, but in any possible clarification as to the administrative practice with reference to them we will state that any sales by a producer to a distributor whose plant is located in Virginia are considered to come within the scope of the regulations.
>
> "Those that are made to the distributors whose plants are in Washington do not.

* * * * * * *

> "As far as sales from distributors to either stores or to homes, doorstep deliveries, we consider any such transactions as may occur within the Arlington-Alexandria market area as defined in the regulations to be under the control of the Milk Commission and to come within the scope of these regulations as regards to the pricing as set forth in the regulation."

At all times in this case, the State Milk Commission and its counsel, the Attorney General of Virginia, the distributors and producers have taken the position that milk deliveries in Arlington from District of Columbia distributors are subject to price-fixing by the Virginia Commission.

At the further hearing, facts were developed that about two-thirds of the milk sold in the Arlington-Alexandria Market came from District of Columbia distributors. Milk produced for the area came 48.73 percent from Virginia, 48.25 percent from Maryland, 1.45 percent from West Virginia, and 1.5 percent from Pennsylvania. About 50 to 65 percent of the sales of the two leading District of Columbia distributors were "retail", i. e., to consumers homes; the remainder was wholesale, to stores, restaurants, schools, and the like. About 75 percent of the retail home deliveries were on a pre-order basis; the remainder were changes in orders arranged between the consumer and the delivery driver; and about one-half of the consumers paid their monthly bills by checks sent to the distributors. About 40 to 50 percent of wholesale deliveries are on a pre-order basis from the two leading District of Columbia distributors. These facts are of importance because the Milk Commission has contended that the deliveries of distributors are all intrastate "peddling" transactions in Virginia, and subject to State price regulation.

After filing of the supplementary record, the Circuit Court issued a second letter-opinion under date of June 20,

1952, attached in Appendix A-2 hereof, sustaining the order of the Milk Commission, saying:

> "Due consideration has been given the supplemental record and the memoranda submitted by counsel. Under the authorities cited therein as applied to the facts in this case, the court is of opinion that the minimum price regulation in question is not a burden on interstate commerce; that the State Milk Commission can legally fix the minimum sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market Area from trucks of the District of Columbia distributors and that Arlington-Alexandria Market Order No. 4 should be sustained."

Following entry of an order in the Circuit Court, the Arlington County Board appealed to the Virginia Supreme Court of Appeals substantially on the same grounds presented here to the U. S. Supreme Court. The Attorney General of Virginia opposed the appeal on its merits, on behalf of the State Milk Commission; not involved were any procedural technicalities. After a brief ex parte presentation by counsel for appellant, the appeal was refused by order entered January 26, 1953 (copy attached in Appendix A-1 hereof), expressly affirming the judgment of the Circuit Court and saying that it was "plainly right".

The Arlington County Board is a body corporate with specific right to sue and be sued, and empowered to take such measures as it may deem expedient to secure and promote the health, safety, and general welfare of the inhabitants of said county. The members of said Board, who were individually named as complainants in the original action, were and their successors are individual consumers of milk in Arlington County. The Board appropriates funds to buy milk for its jail and schools. It's ordinance regulates sanitation standards for milk. The county is competitive with other parts of the Washington Metropolitan area, and its

prosperity requires that it be free from restraints not imposed in other areas. As elected representatives of the people, responsible to them and spending tax funds, it brings this appeal to carry out its statutory functions of bringing suit to protect the general welfare of its people.

The relief sought by the Arlington County Board is an order declaring the regulation of interstate commerce to be beyond the authority of the State Milk Commission, and that the Commission be required to revise its rules and regulations to exclude regulation over interstate commerce.

The Questions Are Substantial

Fundamentally the issues involved in this case are similar to the primary problems involved in several cases decided by the Supreme Court of the United States which followed principles contrary to the decisions in this matter in the Virginia Courts; see *Baldwin* v. *Seelig*, 294 U. S. 511, *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, affirming 17 F. Supp. 575, and *Hood* v. *DuMond*, 336 U. S. 525. Those cases held that a State cannot regulate sale or prices for milk moving directly in interstate commerce. This question is of importance nationally as well as locally, in price regulation of all commodities by States, as well as for milk. If allowed to stand, the Virginia decision would obliterate demarcation between State and Federal authority over interstate commerce as established in the above-cited cases and many others.

In effect, State regulation of interstate commerce for retail prices of milk has been substituted for Federal regulation of farmer-producer prices. Under the interpretation of the State Milk Commission, farmer-producers are free from State regulation in sales to District of Columbia distributors; but the converse is not so, according to the State Milk Commission which regulates competing prices between

Virginia and District of Columbia distributors of milk to consumers. It is the position of the Arlington County Board, however, that Federal regulation of farmer-producer prices is adequate for interstate commerce, without regulation of retail prices; that the County Board's exercise of powers to apply sanitation standards is adequate to protect consumers; and that consumers should enjoy the benefits of price competition from the interstate milk.

1. The Commerce Clause of the United States Constitution prohibits State regulation of prices for milk moving directly in interstate commerce. This was made clear in *Baldwin* v. *Seelig*, supra, in which the Supreme Court of the United States held that the State of New York could not constitutionally prohibit sales of milk, bottled in New York, because the distributor paid less for the milk to Vermont farmer-producers than prescribed under the New York Milk Control Act for New York farmer-producers. The difference between that case and this Virginia situation is only that Virginia attempts to regulate the retail prices, while New York tried to prohibit retail sales of milk for which the distributor paid less than New York wholesale prices. The policy and principles stated by the Supreme Court of the United States in that case would apply equally to both situations; and the Supreme Court has said:

> "Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the States." (294 U. S. 522)
>
> "Commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another, in the faith that augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of san-

itary requirements in the preparation of the product." (294 U. S. 524)

"It is one thing for a state to exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets. It is a very different thing to establish a wage scale or scale of prices for use in other states, and to bar the sale of the products, whether in original packages or in others, unless the scale has been observed." (294 U. S. 528)

"What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended." (294 U.S. 527)

The stand of the Virginia Milk Commission is a reversal of the position taken in *Highland Farms Dairy* v. *Agnew, supra.* There "Highland" corporation, a distributor in the District of Columbia, sold milk to stores owned individually by Luther High in Arlington. The contention there was that both wholesale and retail sales were in interstate commerce and not subject to State regulation; but the statute was interpreted differently, and the Supreme Court of the United States said (300 U. S. 614-615):

"But Highland is not subject to the provisions of the act, and so the Milk Commission has ruled. No matter what the definition of a distributor may be, sales are not affected by any restriction as to price unless made

> within the boundaries of a designated market area. The sections quoted in the margin point fairly to that conclusion. Highland in Washington may sell to High in Virginia, and High may buy from Highland at any price they please. Not till the milk is resold in Virginia within a market area will the price minimum apply, and then only to the price to be charged on the resale."

But as quoted on page 5 of this Statement, the Milk Commission has reversed itself and now holds that the sales from District of Columbia distributors to stores are subject to the State statute, directly contrary to the Supreme Court's decision; and now also holds that retail sales are similarly subject to the statute. However, there is no difference in principle as between retail and wholesale sales, *Schollenberger* v. *Pa.*, 171 U. S. 1. Therefore, the rule in the *Highland Case* prohibits price regulation by Virginia of the sales from District of Columbia distributors directly to Arlington consumers.

In *Hood & Sons* v. *Du Mond*, supra, a New York commission denied a license to purchase milk in New York for export to Massachusetts. The Supreme Court of the United States held this to be contrary to the Commerce Clause of the Constitution of the United States, and said:

> "Baldwin v. Seelig, 294 U. S. 511, is an explicit, impressive, recent and unanimous condemnation by this Court of economic restraints on interstate commerce for local economic advantage, but it does not stand alone. This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of health and safety." (336 U. S. p. 535)

The Supreme Court held in that case that the Commerce Clause protected "every consumer" to "free competition"

(336 U. S. 539). There can be no such free competition under the Virginia Statute and the regulation of minimum prices of milk moving *directly* in interstate commerce.

2. The Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. Sections 601 et seq. particularly section 608 (c), occupies the field of regulation of interstate commerce in milk, to the exclusion of State regulation not in conformity with the Federal plan. In *Hood & Sons* v. *Du Mond*, supra, the Supreme Court said (336 U. S. pp. 544-545):

> "These sections and reports indicate that it is the deliberate policy of the Congress to prevent federal officers from placing barriers in the way of interstate flow of milk. While a statutory prohibition against federal interference with certain phases of it may not always imply that the state too is precluded, it is obvious that a State limitation on export for the benefit of its own consumers is not authorized by this Federal Act."

The court held that the New York State regulation was invalid because not authorized by the Federal statute, as well as because it violated the commerce clause (336 U. S. 545).

Here we have the Virginia State Milk Commission placing price restrictions upon interstate commerce, without any authority from the Federal statute. In fact, the producers' rejection of Federal regulation has placed the Virginia Milk Commission in a substitute status, to fix prices actually followed in the whole Washington metropolitan area, both interstate and intrastate. Not having the authority from Congress to do so, the Virginia Milk Commission should not be permitted to exercise any regulatory function over interstate commerce.

It is submitted that the affirmation of the validity of the order of the Virginia State Milk Commission by the Supreme Court of Appeals of Virginia and by the Circuit Court of

the City of Richmond, was contrary to the Commerce Clause of the United States Constitution and the Agricultural Marketing Agreement Act of Congress; and those decisions of the Virginia courts should be reversed.

Counsel for appellants believes that the questions presented by this appeal are substantial, and that they are of public importance.

Respectfully submitted,

MALCOLM D. MILLER,
Counsel for Appellants,
Munsey Building, Washington 4, D. C.

APPENDIX "A-1"

VIRGINIA:

In the Supreme Court of Appeals held at the Court-Library Building in the City of Richmond on Monday the 26th day of January, 1953.

The petition of the County Board of Arlington County, Virginia, for an appeal from a decree entered by the Circuit Court of the City of Richmond on the 22nd day of July, 1952, in a certain proceeding then therein depending, wherein the said petitioner was plaintiff and State Milk Commission was defendant, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the said decree is plainly right, doth reject said petition and refuse said appeal, the effect of which is to affirm the decree of the said circuit court.

APPENDIX "A-2"

CIRCUIT COURT OF THE CITY OF RICHMOND

Richmond, Virginia

June 20, 1952.

Hon. J. Lindsay Almond, Jr.,
Attorney General of Virginia,
Richmond, Virginia.
Hon. Thomas M. Miller,
Assistant Attorney General of Virginia,
Richmond, Virginia.
Mr. Malcolm D. Miller,
Attorney at Law,
Washington, D. C.
Mr. Roger J. Whiteford,
Attorney at Law,
Washington, D. C.

Re: The County Board of Arlington County, Virginia, a body corporate, et als. v. State Milk Commission

GENTLEMEN:

By a decree entered October 9, 1951, the court held that the notice which preceded the public milk hearing in the

Arlington-Alexandria Market Area on January 11, 1951, was sufficient and lawful; that the State Milk Commission had authority to raise, lower or refuse to change the price of milk in said market area and that Arlington-Alexandria Market Order No. 4 increasing milk prices was not unreasonable or capricious. Since the record was devoid of factual basis for a consideration of the question of interstate commerce as related to said market area, the court by said decree remanded the record to the State Milk Commission for the taking of such additional testimony as may be offered by the petitioners, the defendant or any other interested parties relating to the moving of milk in interstate commerce in said market area, the Commission was directed to certify and file with this court such additional testimony taken, and if said order No. 4 be amended by the Commission to file same with this court. The Commission filed the additional testimony but did not amend said order No. 4.

Due consideration has been given the supplemental record and the memoranda submitted by counsel. Under the authorities cited therein as applied to the facts in this case, the court is of opinion that the minimum price regulation in question is not a burden on interstate commerce; that the State Milk Commission can legally fix the minimum sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market Area from trucks of the District of Columbia distributors and that Arlington-Alexandria Market Order No. 4 should be sustained.

Upon presentation of a proper decree, same will be entered.

Yours very truly,

HAROLD F. SNEAD,
Judge.

s/s

APPENDIX "A-3"

CIRCUIT COURT OF THE CITY OF RICHMOND

Richmond, Virginia

September 26, 1951.

Hon. J. Lindsay Almond, Jr.,
Attorney General of Virginia,
Hon. Thomas M. Miller,
Assistant Attorney General of Virginia,
Library Building,
Richmond, Virginia.
Mr. Malcolm D. Miller,
Attorney at Law,
Munsey Building,
Washington 4, D. C.

Re: The County Board of Arlington County, Virginia, a body corporate, et als. v. State Milk Commission

GENTLEMEN:

After due consideration of the petition for appeal, the answer thereto, the record certified to the court by the State Milk Commission, the oral argument and memoranda submitted by counsel, the court is of opinion that the contention of the petitioners that the order of the commission designated as Arlington-Alexandria Market Order No. 4, increasing milk prices was unreasonable and capricious, because it was issued after notice and hearing which did not give actual notice or bring in issue the matter of increasing prices and that the issue presented by the producers and considered at the hearing was limited to the question whether the seasonal reduction should occur, is without merit. The notice of the public milk hearing reads in part "• • • for the purpose of considering the entire price structure concerning the sale of milk and to consider an adjustment in any or all prices of the sale of milk for the following markets, who will be heard in the order listed, Arlington-Alexandria, Manassas, Fredericksburg • • •". The record disclosed that said notice of hearing was duly published in eleven newspapers having circulation in the milk area. As to the contention that the issue was limited

to the question whether the seasonal reduction should occur, the court is of opinion that after having given the above required notice of hearing and having conducted said hearing the commission had authority to raise, lower or refuse to change the price of milk.

In regard to the second contention of the petitioners that the State Milk Commission is without authority or jurisdiction to fix the prices of milk moving directly in interstate commerce, attention is directed to Section 3-371 (3) of the Code of Virginia, 1950, which provides in part that in an appeal to this court from an order of the State Milk Commission, the case shall be heard upon the record certified to the court by the commission. The defendant by counsel contends that there is no evidence in the record that milk passes in interstate commerce and consequently there is no factual basis for a consideration of the question of interstate commerce by this court. As the record is presently constituted, the court is of opinion that it should not consider this question.

The above quoted section of the Code further provides "* * * but the court may, in proper cases, remand the record to the commission for the taking of such further testimony as was not available upon the hearing appealed from, or such other testimony as the court shall provide may be taken."

The court is of opinion that this is a proper case in which to remand the record to the commission in order to permit the petitioners to offer material and relevant testimony in regard to the question of milk moving in interstate commerce. In light of additional testimony given, the commission should give consideration as to whether or not Arlington-Alexandria Market Order No. 4 should be amended or revised. The commission shall certify and file with the court such additional testimony and if said order is amended or revised same shall also be filed with this court.

Upon presention of a proper decree, same will be entered.

Yours very truly,

HAROLD F. SNEAD,
Judge.

s/s

APPENDIX "B"

EXTRACTS, VIRGINIA MILK AND CREAM ACT, 1950 CODE OF VIRGINIA:

Section 3-359. "The (Virginia Milk) commission, after public hearing and investigation may fix the prices to be paid producers or associations of producers by distributors in any market or markets, may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market, and may also fix different prices for different grades of milk. In determining the reasonableness of prices to be paid or charged in any market or markets for any grade, quantity, or class of milk, the commission shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public."

Section 3-381. "No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto."

APPENDIX "C"

EXTRACTS: AGRICULTURAL MARKETING AGREEMENT ACT OF 1937, AS AMENDED, TITLE 7, U. S. CODE:

Section 601: It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

Section 608: (1): The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, asso-

ciations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title as "handlers". Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

* * * * * * *

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representa-

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tive period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for in this section:

* * * * * * *

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JUN 16 1953

OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

In The
Supreme Court Of The United States

October Term, 1952 1953

No. 128

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, a body corporate, et al.,
Appellants,

vs.

STATE MILK COMMISSION OF THE COMMONWEALTH OF VIRGINIA,
Appellee.

MALCOLM D. MILLER,
Attorney for Appellant
Munsey Building
Washington 4, D. C.

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In The
Supreme Court Of The United States

October Term, 1952

No.

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, a body corporate, et al.,
Appellants,

vs.

STATE MILK COMMISSION OF THE COMMONWEALTH OF VIRGINIA,
Appellee.

OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Comes now appellant, the Arlington County Board, and submits this memorandum brief in opposition to appellee's motion to dismiss the appeal in this case, or in the alternative to affirm the judgment of the court below. Appellant prays that the Court deny the motion and note probable jurisdiction.

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QUESTIONS PRESENTED

The contention of appellee is that there is no substantial constitutional question because of previous decisions of this Court.

On the other hand, appellant contends that the decisions cited by appellee, and appellee's arguments, do not support its motion. Appellant further contends that the prior decisions of this Court uphold appellant's contentions that the Virginia Milk Commission had no jurisdiction over the prices of milk delivered from District of Columbia distributors to Arlington consumers, because of the interstate commerce involved.

REPLY TO APPELLEE'S CONTENTIONS

1. *The Milk Deliveries are not peddling operations in Intrastate Commerce, as might be inferred from Appellee's Presentation of the Facts, and from its reliance upon Wagner* v. *Covington* 251 U.S. 95, *and Caskey Baking Co.* v. *Virginia*, 313 U. S. 117.

Both of the cited cases involved imposition of business license taxes, one for a peddler of soft drinks, the other for a peddler of bread. In both decisions the U. S. Supreme Court emphasized, in almost identical language, that these statutes did not license or tax the activity of transporting the goods across State lines, but rather the purely local business of peddling (see 251 U. S. 103 and 313 U. S. 119).

To the contrary of appellee's position here, the Supreme Court said in the earlier of the above-cited cases (251 U. S. 100):

> "It is indisputable that with respect to the goods occasionally carried upon plaintiffs' wagon from one

State to the other in response to orders previously received at their place of business in Cincinnati, plaintiffs are engaged in interstate commerce, not subject to the licensing power of the Kentucky municipality."

The record in this case shows that about 75 percent of the retail sales to consumers are on the preorder basis, which were like those held not subject to the licensing power of Kentucky. Therefore, the above-cited case is authority contrary to appellee's contention, and supports appellant's position that such sales are not subject to Virginia price regulation.

2. *Appellee errs in its Counsel's Statement that Appellant "Concedes" that Wholesale Sales in Interstate Commerce are Subject to State Price Regulation, while Contending the Retail Sales are not Subject to State Regulation.*

No such concession has ever been made by appellant, and there is absolutely nothing in the record to justify appellee's contention to that effect.

To the contrary, from the very beginning of this matter, appellant has always contended that the U. S. Supreme Court had said, in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 614-6, that the wholesale sales in interstate commerce were not subject to State jurisdiction, and hence appellant has always contended that retail sales from District of Columbia distributors directly to Arlington consumers, also should not be regulated by the State Milk Commission. Counsel for appellee quotes, in fact, from appellant's memorandum brief to the court below, where appellant's counsel said:

"There is no essential difference between Highland

> and High and between the Thompson Dairy (likewise Chestnut Farms) and the writer of this brief who receives their milk at his doorstep."

In other words, the status of the wholesale sales was not attacked, because appellant has regarded that question as having been decided; and the decision of this Court was that these direct, interstate, wholesale sales of milk were *not* subject to State regulation. All through this proceeding, from the beginning, appellant has taken the position that there is no difference, in principle between the wholesale and retail sales directly from the District of Columbia distributors to Arlington purchasers, and that neither are subject to State price regulation because the milk moved directly in interstate commerce.

In its motion, appellee says: "The evidence shows that the sales are made under identically the same conditions". Appellant has no quarrel with that statement, because it is so, and because the wholesale sales were found *not* subject to Virginia price regulation in the *Highland case*, supra. Neither should the retail sales directly from the District of Columbia distributors be subject to State regulation.

The mistake made by appellee's counsel is in the following comparison:

> "Certainly milk delivered to a restaurant in fluid form is delivered 'for consumption' in the State. Is there any difference between the consumer on the doorstep and the consumer in the restaurant? Of course, a restaurant too is a consumer as well."

The status of the sale as being subject to State price regulation has nothing to do with the fact of consumption. The rule to follow was stated by the U. S. Supreme Court in

Highland Farms Dairy v. *Agnew, supra,* (300 U. S. at page 615):

> "Highland in Washington may sell to High in Virginia and High may buy from Highland at any price they please. Not till the milk is resold in Virginia within a market area will the price minimum apply, and then only to the price to be charged on resale."

The difference in the situations described by appellee's counsel is that the consumer of milk in an Arlington restaurant has paid a price upon "resale", whereas there has been no resale when the milk comes to the consumer directly from the District of Columbia. This latter sale, like the wholesale delivery from Highland to High, should be "at any price they please", regardless of the Virginia Milk Commission to the contrary.

3. *The Exercise of the General Price-Fixing Authority of State Law does not justify Regulation of Prices of Commodities moving in Interstate Commerce.*

Cases cited by appellee's counsel dealing with the "due process of law" involved in price-fixing of milk, had nothing to do with the problem of regulating interstate commerce; these cited cases were *Nebbia* v. *New York,* 291 U. S. 502, and *Reynolds* v. *Milk Commission,* 163 Va. 957. They are not relevant to the issues of interstate commerce involved in this case; see *Hood & Sons* v. *Du Mond,* 336 U. S. 525, 530.

Counsel for appellee says of State regulation: "its purpose in fixing minimum resale prices is to conserve health and promote economic stability among Virginia producers." But this Court has held that such purposes do not justify State regulation of milk prices in interstate commerce.

In *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, 524, this Court said: "but commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another, in the faith that augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product." Therefore, this Court has ruled contrary to appellee on the point.

4. *This is not a Case of State Regulation which Incidentally Affects Interstate Commerce prior to the Interstate Movements; and the Case of Milk Board* v. *Eisenberg Co., 306 U. S. 346, is not in point.*

Counsel for appellee relies upon the Eisenberg case, cited. In that case this Court upheld the State regulation of milk prices paid to Pennsylvania producers by Pennsylvania receivers who subsequently transported the milk from the receiving stations to New York. But the Court did so on the ground that the regulation was "local in Pennsylvania", before the interstate movement began, which was quite a different situation from the Arlington situation, saying (pp. 352-3):

> "The activity affected by the regulation is essentially local in Pennsylvania. Upon the completion of that transaction the respondent engages in conserving and transporting its own property. The Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York. If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to

another state the uniform operation of the statute locally would be crippled and might be impracticable. Only a small fraction of the milk produced by farmers in Pennsylvania is shipped out of the Commonwealth. There is, therefore, a comparatively large field remotely affecting and wholly unrelated to interstate commerce within which the statute operated. These considerations we think justify the conclusion that the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress."

This limitation to the scope of the *Eisenberg* case was specifically pointed out in *Hood & Sons* v. *Du Mond*, 336 U. S. 525, 530.

In the Arlington case we have a much different situation than in the Eisenberg case. Here, less than one-half the milk supply for the metropolitan area comes from Virginia; and about two-thirds of the milk from distributors in northern Virginia comes from the District of Columbia. When these movements are directly in interstate commerce, they are not within the jurisdiction of State regulation.

5. *Appellee has failed to answer Appellant's point that Federal Statutes do not permit Virginia Regulation of Interstate Commerce.*

Appellant has contended that Virginia regulation is not a proper substitute for Federal regulation. Federal regulation of minimum farmer-producer prices was once in effect, from November 1945 to March 1947; but was terminated by three-fourths vote of the producers. While the Federal statute does not regulate prices from distributors to consumers; the Virginia price-fixing order is restrictive on in-

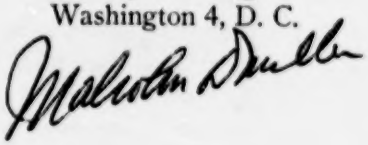
terstate commerce, and "can claim neither federal sponsorship nor congressional sanction"; and should be regarded as unauthorized regulation of interstate commerce; see *Hood & Sons* v. *Du Mond, supra,* (336 U. S. 540-545).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should deny the motion to dismiss the appeal or in the alternative to affirm the judgment below; and appellant prays that the Court note probable jurisdiction.

Respectfully submitted,

MALCOLM D. MILLER,
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Washington 4, D. C.



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FILED
DEC 14 195
HAROLD B. WILLEY,

In The
Supreme Court Of The United States
OCTOBER TERM, 1953

No. 128

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, A BODY CORPORATE, ET AL.,
Appellants,

vs.

STATE MILK COMMISSION

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR APPELLANTS

MALCOLM D. MILLER,
Counsel for Appellants.

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In The
Supreme Court Of The United States
OCTOBER TERM, 1953

No. 128

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, A BODY CORPORATE, ET AL.,
Appellants,

vs.

STATE MILK COMMISSION

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR APPELLANTS

OPINIONS BELOW

Opinions below were not reported.

Two letter-opinions of the Circuit Court of the City of Richmond are set forth in the Record on pages 50-52 and 100-101.

The order of the Virginia Supreme Court of Appeals refusing an appeal, and affirming the decision of the Circuit Court, is set forth in the Record at page 148.

The Virginia State Milk Commission submitted the record on the question without opinion; see Record at pages 99-100.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered on January 26, 1953 (R. 148). A petition for appeal was presented to the Supreme Court of Appeals of Virginia on April 20, 1953; but was refused on April 21, 1953 (R. 149-150). Chief Justice Vinson granted an appeal on April 23, 1953 (R. 151). The jurisdiction of this Court to review this decision by direct appeal is conferred by Title 28, U. S. Code, Section 1257. The Court noted probable jurisdiction on October 12, 1953.

QUESTION PRESENTED

Where an order of the Virginia State Milk Commission fixes minimum milk prices under State statute, for milk sold to consumers in Arlington County, Virginia, by District of Columbia distributors who transport such milk by trucks directly from their processing plants in the District of Columbia to the consumers in Arlington County; is such price-fixing order, and its application to such sales, in violation of the Commerce Clause of the United States Constitution and contrary to the occupancy of the field under provisions of the Federal Marketing Agreement Act of 1937, as amended, Title 7, U.S. Code, sections 601 et seq., particularly section 608 (c).

STATEMENT

This controversy was precipitated by the above-described

Order No. 4 of the State Milk Commission, issued on January 17, 1951, effective January 21, 1951 (R. 32), unexpectedly increasing retail prices for milk delivered in Arlington by District of Columbia distributors following a hearing which had not covered this subject (R. 1-2, 49, 50-51, 52).

Using the statutory procedure for judicial review under the Milk and Cream Act, the Arlington County Board and its members filed a petition for appeal (R. 1-5) in the Circuit Court of the City of Richmond, Virginia, contending that most of the milk purchased from District of Columbia distributors, by Arlington consumers, was moving in interstate commerce, and that the Virginia Milk Commission had no jurisdiction to regulate prices of such milk moving in interstate commerce by reason of the following provision of the Virginia Milk and Cream Act (Section 3-381 of the 1950 Virginia Code):

> "No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto."

Not only was the contention made that the State Milk Commission had no authority because of the Commerce Clause of the U. S. Constitution, but also that the regulation was not in conformity with the Federal Marketing Agreement Act of 1937, which also provides for Federal regulation of milk prices. Annexed to the petition filed in the Circuit Court of the City of Richmond were certified copies of orders of the U. S. Secretary of Agriculture, which had established minimum price regulation of farmer-producer prices in the Washington area, which included Arlington, effective No-

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vember 3, 1945. Federal regulation of such prices ended on March 31, 1947, as a result of a vote of the farmer-producers in accordance with section 608 (c) (16), Title 7, U. S. Code (R. 67-31, 83-84), (Orders are cited as 10 F.R. 13581 and 12 F.R. 2087.) Extracts from the Virginia and Federal Statutes are set forth in Appendices A and B of this brief.

A hearing was held by the Circuit Court of the City of Richmond, following which the matter was remanded to the State Milk Commission for further hearing as to facts in regard to the question of the milk moving in interstate commerce. See letter opinion of September 26, 1951, and decree of October 9, 1951 (R. 50-55).

A further hearing was held by the State Milk Commission on October 10, 1951. (R. 55-98) It was attended by representatives of Arlington County, the State Milk Commission, the producers, and distributors located in both Virginia and the District of Columbia (R. 70). It is of interest to note that for convenience the hearing was held in the District of Columbia (R. 71). Most of the facts were given by the two leading District of Columbia distributors and by the State Milk Commission (R. 71-98). However, the distributors and producers have not formally intervened. Afterwards, the State Milk Commission received memorandum briefs, but certified the record to the Circuit Court without opinion and without changing the order (R. 99-100).

On this record at the hearing, the State Milk Commission announced its interpretation of the scope of its authority and the application of the price-fixing order, as follows (R. 94-95):

> "The regulations for the Arlington-Alexandria market have been filed as part of these proceedings.

> They of course speak for themselves, but in any possible clarification as to the administrative practice with reference to them we will state that any sales by a producer to a distributor whose plant is located in Virginia are considered to come within the scope of the regulations.
>
> "Those that are made to the distributors whose plants are in Washington do not . . .
>
> ". . . As far as sales from distributors to either stores or homes, doorstep deliveries, we consider any such transactions as may occur within the Arlington-Alexandria market area as defined in the regulations to be under the control of the Milk Commission and to come within the scope of these regulations as regards to the pricing as set forth in the regulation."

At all times in this case, the State Milk Commission and its counsel, the Attorney General of Virginia, and the distributors, have taken the position that milk deliveries in Arlington from District of Columbia distributors are subject to price-fixing by the Virginia Commission. (R. 49-50. 77, 131)

At the further hearing, facts were developed that about two-thirds of the milk sold in the Arlington-Alexandria Market came from District of Columbia distributors (R. 86, 99). Milk produced for the area came 48.73 percent from Virginia, 48.25 percent from Maryland, 1.45 percent from West Virginia, and 1.57 percent from Pennsylvania (R. 98). About 50 to 60 percent of the sales of the two leading District of Columbia distributors were "retail", i.e., to consumers' doorsteps, the remainder was wholesale to stores, restaurants, schools, and the like (R. 79). About 75 percent of the retail home deliveries were on a pre-order basis, the remainder were changes in orders arranged between the

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consumers and the delivery drivers (R. 74, 81). About one-half of the consumers paid their monthly bills by checks sent to the distributors (R. 74, 82). About 40 to 50 percent of wholesale deliveries are on a pre-order basis from the two leading District of Columbia distributors (R. 79-81). These facts are of importance, because the State Milk Commission has contended that the deliveries of distributors are all intrastate "peddling" transactions in Virginia, and subject to State price regulations (R. 132-134).

After filing of the supplementary record (R. 99-100), the Circuit Court issued a second letter-opinion under date of June 20, 1952 (R. 100-101), sustaining the order of the Milk Commission, saying:

> "Due consideration has been given the supplemental record and the memoranda submitted by counsel. Under the authorities cited therein as applied to the facts in this case, the court is of opinion that the minimum price regulation in question is not a burden on interstate commerce; that the State Milk Commission can legally fix the minimum sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market Area from trucks of the District of Columbia distributors and that Arlington-Alexandria Market Order No. 4 should be sustained."

The decree (R. 101-102) applied this ruling "irrespective of the point of origin of the milk so delivered."

Following entry of an order in the Circuit Court, the Arlington County Board appealed to the Virginia Supreme Court of Appeals substantially on the same grounds presented here to the U. S. Supreme Court (R. 102-128). The Attorney General of Virginia opposed the appeal on its

merits, on behalf of the State Milk Commission; not involved were any procedural technicalities (R. 128-148). After a brief ex parte presentation by counsel for appellant, the appeal was refused by order entered January 26, 1953, expressly affirming the judgment of the Circuit Court and saying that it was "plainly right". (R. 148)

The Arlington County Board is a body corporate with specific right to sue and be sued, and empowered to take such measures as it may deem expedient to secure and promote the health, safety, and general welfare of the inhabitants of said county. The members of said Board, who were individually named as complainants in the original action, were and their successors are individual consumers of milk in Arlington County. The Board appropriates funds to buy milk for its jail and schools (R. 1-5, 74). Its ordinance regulates sanitation standards for milk. The county is competitive with other parts of the Washington Metropolitan area, and its prosperity requires that it be free from restraints not imposed in other areas. As elected representatives of the people, and responsible to them and spending tax funds, it brings this appeal to carry out its statutory functions of bringing suit to protect the general welfare of its people.

The relief sought by the Arlington County Board is an order from the State Courts declaring the regulation of interstate commerce to be beyond the authority of the State Milk Commission and that the Commission be required to revise its rules and regulations to exclude regulation over interstate commerce (R. 4-5).

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Appeals of Virginia erred:

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1. In affirming the decree of the Court below entered on July 22, 1952, by the Circuit Court of the City of Richmond, Virginia, and in refusing an appeal from such decree by which the said Circuit Court upheld the validity of an order of the State Milk Commission of the Commonwealth of Virginia increasing prices of milk in Arlington-Alexandria Market Order No. 4 which was the subject of that proceeding.

2. In holding that the said Circuit Court was "plainly right" in its decree and in its letter-opinion under date of June 20, 1952, in which the said Circuit Court held "that the State Milk Commission can legally fix the minimum sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market Area from trucks of the District of Columbia distributors and that Arlington-Alexandria Market Order No. 4 should be sustained."

3. In holding that the said Circuit Court was "plainly right" in said decree and in said opinion in which the Circuit Court held "that the minimum price regulation in question is not a burden on interstate commerce".

4. In failing to grant an appeal and held that the said order of the State Milk Commission was in violation of the Commerce Clause of the United States Constitution (Article 1, Section 8, Clause 3); and, hence that said order of the State Milk Commission was beyond its jurisdiction.

5. In failing to grant an appeal and held that the field of milk price regulation in the Arlington-Alexandria Market Area, under said Commerce Clause of the United States Constitution, had been occupied by the United States Government under an Act of Congress (7 U. S. Code, sec. 601 et seq. particularly section 608 (c) to the exclusion of regulatory jurisdiction by the State Milk Commission of the Commonwealth of Virginia in said area.

SUMMARY OF ARGUMENT

Appellant contends that regulation by the Virginia State Milk Commission of prices for milk sold to consumers in Arlington County, Virginia, by District of Columbia distributors who transport such milk by trucks directly from their processing plants in the District of Columbia to consumers in Arlington County, is in violation of the Commerce Clause of the U. S. Constitution, and is unauthorized and contrary to the occupancy of the field under provisions of the Federal Marketing Agreement Act of 1937, as amended, Title 7, U. S. Code, sections 601 et seq., particularly section 608 (c).

The decisions of the Virginia Courts are contrary to three prior decisions of the United States Supreme Court in milk cases. This Court held in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, affirming 17 F. Supp. 511, that this same Virginia statute in question did not regulate sales of milk from District of Columbia distributors to Virginia stores; and the District Court held regulation of this traffic would be in violation of the Commerce Clause. In *Baldwin* v. *Seelig*, 294 U. S. 511, this Court condemned New York regulation of prices paid Vermont producers by New York distributors, because of the impediment upon interstate commerce. In *Hood and Sons* v. *Du Mond*, 336 U. S. 525, this Court held that New York could not deny a license for establishment of a receiving plant in New York for export of milk to Massachusetts, because such regulation was in violation of the Commerce Clause and was not authorized by the Federal Marketing Agreement Act. This Court held that it was the intention of Congress that interstate traffic in milk should be free from economic impediments by States, and that such State regulation was not authorized by the Federal statute.

Federal regulation of milk prices paid producers was effective from November 1945 to March 1947, but was cancelled because of a vote of more than 50 percent of the producers to eliminate the Federal regulation. Under Federal regulation there was power to regulate interstate producers' prices, *U. S.* v. *Wrightwood Dairy Co.*, 315 U. S. 110. The Virginia Milk Commission also regulates producer prices, although not those paid by District of Columbia distributors. The State Milk Commission regulates retail and wholesale prices but they are necessarily predicated upon producer prices whether interstate or intrastate, and one would affect and indirectly regulate the other. The State Milk Commission cannot fill the void, and regulate interstate commerce. Where there is no cooperative or coordinated regulation, the State regulation of producer, wholesale, and retail prices invades the field occupied by Congress; and the State regulation is unauthorized and contrary to the Commerce Clause.

Virginia Courts erred in upholding jurisdiction of the State Milk Commission over interstate milk because of the State Courts' misconception of what constitutes "burden upon interstate commerce". This is not a situation where exercise of State powers indirectly or incidentally affects interstate commerce. This is a situation largely of interstate commerce, involving sale, transportation, and delivery of milk directly across the State lines in interstate commerce, involving economic impediments subject only to the regulatory power of Congress. The "delivery" and "sale" are not separable parts of the interstate movement and are not intrastate commerce. As most deliveries were on a pre-order basis, they were not intrastate "peddling" operations as appellee has contended.

The Virginia Milk and Cream Act does not authorize

regulation over interstate traffic in milk from District of Columbia distributors directly to Arlington consumers. The Virginia Milk Commission has no authority from Congress to regulate interstate milk prices, particularly in the absence of Federal regulation which was frustrated by vote of the producers in 1947. Virginia regulation of interstate commerce in milk violates of the Commerce Clause of the United States Constitution.

ARGUMENT

I

The Decisions of the Virginia Courts are Contrary to Prior Decisions of the U. S. Supreme Court.

The decisions of the Virginia Courts in this case are contrary to a prior decision of this Court which interpreted this same statute, involving milk sales for this same area, in *Highland Farms Dairy* v. *Agnew,* (1936), 300 U. S. 608.

In the cited case, "Highland" corporation, a distributor in the District of Columbia, sold and delivered milk to retail stores owned individually by Luther High in the Arlington-Alexandria area. Neither Highland nor High complied with requirements of the Virginia Milk and Cream Act, and the State Milk Commission threatened to enforce the act against High's retail sales. "No proceedings against Highland were begun or threatened, the Commission taking the position that Highland was not subject to the prohibitions of the statute, its sales and purchases in Virginia being in interstate commerce. In spite of this disclaimer, Highland joined with High in suing to enjoin the enforcement of the Act." (300 U. S. 611.) In its decision this Court said (at pages 614-615):

"Argument . . . (that there was a burden on in-

terstate commerce) is built upon the definition of the word 'distributor' contained in § 1. We learn from that section that distributors include 'persons wherever located or operating, whether within or without the Commonwealth of Virginia, who purchase, market, or handle milk for resale as fluid milk in the Commonwealth of Virginia.' This definition, we are told, takes in the plaintiff Highland, who buys milk and sells it in interstate commerce, and does so with the expectation that upon arrival in Virginia the milk will be resold. But Highland is not subject to the provisions of the act, and so the Milk Commission has ruled. No matter what the definition of a distributor may be, sales are not affected by any restriction as to price unless made within the boundaries of a designated market area. The sections quoted in the margin point fairly to that conclusion. Highland in Washington may sell to High in Virginia, and High may buy from Highland, at any price they please. Not till the milk is resold in Virginia within a market area will the price minimum apply, and then only to the price to be charged on the resale. Cf. *Wiloil Corp.* v. *Pennsylvania*, 294 U.S. 169, 175; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506; *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511. If there could be any doubt about this as a matter of construction, the doubt would be dispelled by the administrative practice and by the warning of the statute, expressed in § 14, that operations in interstate commerce shall not be deemed to be affected. So also as to the requirement of a license expressed in § 4. High needs a license to the extent that he sells at retail to consumers in Virginia. Highland does not need one, and the Commission is not asking it to apply for one, because its business as now conducted with persons in Virginia is interstate

exclusively. Clumsy draftsmanship may have spread a fog about the section when viewed in isolation or taken from its setting. The fog scatters when we recall the provisions of § 14 and the administrative practice. Appellants' fears are visionary."

The 3-Judge District Court said of the same contention stated above (17 F. Supp. 575,):

"If the act is given this meaning, it is doubtless invalid as a direct and unconstitutional burden on interstate commerce. In *Baldwin* v. *G. A. F. Seelig,* 294 U. S. 511; 55 S. Ct. 497, 79 L. Ed. 1032, 101 A.L.R. 55, the Supreme Court held that a law or regulation of the state of New York was invalid, as a violation of article 1, sec. 8, cl. 3 of the Constitution, which prohibited the sale of milk imported from another state unless the price paid therein to the producer was equal to the minimum prescribed by New York for purchases from local producers. We think that the act does not have the meaning attributed it, although the language of the sections under discussion give some support to the complainants' argument; for when the act is considered as a whole, including the admonition of section 14 that no provision of the act shall be construed to apply to foreign or interstate commerce except in so far as the same may be effective pursuant to the United States Constitution. It is seen that the act was not designed to apply to a distributor beyond the state either as to prices or licenses."

But there has been a complete "about-face" by the Virginia State Milk Commission since the *Highland* case. The Commission now holds that these sales from distributors

to stores, as well as retail customers, are subject to State price regulation; and the Commission so stated at the hearing in this case (R. 95). There is no essential difference in principle, however, between the retail to consumers and wholesale sales to stores from distributors. See *Schollenberger* v. *Pa.*, 171 U. S. 1, 24, and the principle of the *Highland* case should be applied to distributors' sales to consumers, as involved in this case, as well as to stores.

The contrariness of the Virginia Milk Commission should result in either of two conclusions: (1) If the prior interpretation of the Virginia statute is to be followed, then the State Milk Commission obviously has no statutory power to regulate prices of milk sold by District of Columbia distributors directly to consumers or stores. (2) On the other hand, it now asserts its authority to regulate the very prices which the District Court specifically held would be a violation of the Commerce Clause. Hence in either situation the order of the State Milk Commission would be invalid under the *Highland* case.

In the *Highland* case, the 3-Judge District Court and this Court relied upon *Baldwin* v. *Seelig*, 294 U. S. 511. In that case this Court held that New York could not constitutionally prohibit sales of milk, bottled in New York, because the distributor violated New York regulations by paying less for the milk to Vermont farmer-producers than prescribed under the New York Control Act for New York farmer-producers. The difference between that case and this Virginia situation is only that Virginia attempts to regulate the retail prices, while New York tried to prohibit retail sales of milk for which the distributor paid the Vermont producers less than New York wholesale prices. The policy and principles stated by the Supreme Court of the United States in that case would apply equally to both situations; and the Supreme Court has said:

"Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states." (294 U. S. 522)

* * * * * * * *

"Commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another, in the faith that augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product." (294 U. S. 524)

* * * * * * * *

"What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purpose of suppressing competi-

tion from without and leading inescapably to the suppression so intended."

"The statute here in controversy will not survive that test. A dealer in milk buys it in Vermont at prices there prevailing. He brings it to New York, and is told he may not sell it if he removes it from the can and pours it into bottles. He may not do this for the reason that milk in Vermont is cheaper than milk in New York at the regimented prices, and New York is moved by the desire to protect her inhabitants from the cut prices and other consequences of Vermont competition. To overcome that competition a common incident of ownership—the privilege of sale in convenient receptacles—is denied to one who has bought in interstate commerce. He may not sell on any terms to any one, whether the orders were given in advance or came to him thereafter . . ." (294 U. S. 527)

* * * * * * *

". . . It is one thing for a state to exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets. It is a very different thing to establish a wage scale or a scale of prices for use in other states, and to bar the sale of the products, whether in the original package or in others, unless the scale has been observed." (294 U. S. 528)

In *Hood & Sons* v. *Du Mond*, 336 U. S. 525, a New York commission denied a distributor's license to purchase milk in New York for export to Massachusetts. The Supreme Court of the United States held this to be contrary to the Commerce Clause of the Constitution of the United States, and said:

> "*Baldwin* v. *Seelig*, 294 U. S. 511, is an explicit, impressive, recent and unanimous condemnation by this Court of economic restraints on interstate commerce for local economic advantage, but it does not stand alone. This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of health and safety." (366 U. S. p. 535)

The Court in that case pointed out that the Commerce Clause contains one of the important guarantees of freedom in the Constitution, saying (p. 539):

> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality."

Appellants in this case are claiming this guarantee of freedom, and ask that the Court give it reality.

Also in *Hood and Sons* v. *Du Mond*, supra, this Court held that the New York regulation was not only in violation of the Commerce Clause, but also that it was "not authorized by federal legislation pursuant to the Clause." (336 U. S. 545) In the next part of the argument of this

Brief, the Court is asked to reach the same conclusion as to the Virginia price regulation in this case.

II

The Virginia Courts Erred in Failing to Recognize Occupation In the Field of Regulation by Act of Congress.

While the initial complaint in this proceeding specifically raised the question of Federal occupancy of milk price regulation, the Virginia Courts have completely ignored the matter.

There was Federal milk price regulation in the Arlington-Alexandria area, effective November 3, 1945 (R-6A to 27, 10 F.R. 13581). By vote of the producers, this regulation was discontinued, effective March 31, 1947 (R-28A to 31, 12 F.R. 2078). The revocation upon vote of more than 50 percent of the producers was in accordance with the Federal Marketing Agreement Act, 7 U.S.C. section 608 (c) (16) (B). There is nothing in this Act, however, which indicates that State regulation should be substituted while the Federal regulation is dormant, nor is there anything in the Federal Act indicating that the producers may choose between Federal and State regulation. It would seem that the choice given producers by Congress has been between either Federal regulation or no regulation in interstate commerce.

The Federal statute requires the Secretary of Agriculture to establish initial milk prices for farmer-producers upon the equivalent purchasing power of a base period, with authority to revise the prices under changed economic conditions and also to "insure a sufficient quantity of pure and wholesome milk, and be *in the public interest*". (See Title 7 U.S.C., section 608 (c) (18), emphasis added.)

Section 601 of the Federal statute (Title 7 U.S.C.) provides:

> "It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce."

This statute was given the following interpretation by the U. S. Supreme Court in *Hood & Sons* v. *Du Mond*, supra, (336 U. S. 544-5):

> "These sections and reports indicate that it is the deliberate policy of Congress to prevent federal officers from placing barriers in the way of the interstate flow of milk. While a statutory prohibition against federal interference with certain phases of it may not always imply that the state too is precluded, it is obvious that a state limitation on export for the benefit of its own consumers is not authorized by this Federal Act. The purpose as expressed in sec. 1., 7 U.S.C. sec. 601, is to avoid conditions which burden and obstruct the normal channels of interstate commerce. The object of the federal program to raise and stabilize the price of products was to stimulate interstate commerce. The order of the Commissioner avows itself to have the opposite effect. It can claim neither federal sponsorship nor congressional sanction.

In the instant situation, we have State regulation of retail prices asserted in the field of direct movements in interstate commerce, and ouster of Federal regulation by vote of the producers, with the substitution of State regulation over interstate commerce.

The Federal and Virginia statutes are different in that the State statute authorizes direct regulation of retail prices, and maximum as well as minimum prices to consumers, while the Federal regulation provides for protection of the consumer "in the public interest" in an indirect manner. But the fact that regulation is different, or complementary, does not result in the conclusion that some portion of the field has been left open to the States; see *Hines* v. *Davidowitz*, 312 U. S. 52, 66-71 in which the Court said:

> "And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."

In Virginia, of course, the regulation of retail milk prices in interstate commerce indirectly regulates the prices paid to producers, which the Federal legislation would directly regulate. These differences go to the methods of regulation, however, rather than to the purpose of the regulation or to the completeness of the schemes. But the differences of method do not authorize State action. In *First Nat. Ben. Soc.* v. *Garrison*, 58 F. Supp. 972, 155 F. 2d 522, the District Court said:

> "When Congress exercises its exclusive powers over interstate commerce, the states cannot legislate on the subject, and the situation is covered as much by what is not done by Congress or the Interstate Commerce Commission, as by the regulations it has made, and the State has no power to fill what it may regard as a

hastus left by Congress and the Interstate Commerce Commission."

The fact that the Federal regulations have not been made effective does not result in conferring jurisdiction upon the State. Occupancy of the field by the Federal government is made by legislation, as shown by the following:

"The federal and state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power." See *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 612-3.

"It is suggested that the States may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the States to quarantine, and that if he does not act there is no invalidity in the state action. Such construction as that can not be given to the federal statute. The obligation to act without respect to the States is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary. With the federal law in force, state action is illegal and unwarranted." *Oreg.-Washington Co.* v. *Washington*, 270 U. S. 87, 101-2

Neither does the silence of Congress authorize the States to regulate interstate commerce; this Court has said:

> "Nothing which is a direct burden upon interstate commerce can be imposed by the State without assent of Congress, and . . . the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free." *Brennan* v. *Titusville*, 153 U. S. 299, 302.
>
> "Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity, or by that means of transportation shall be free." *Bowman* v. *Chicago*, 125 U. S. 465, 485.
>
> "The contention that, in the public interest, the business is one requiring regulation, need not be challenged. But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that the particular commerce shall be free from regulation." *Missouri* v. *Kansas Gas Co.* 265 U. S. 298, 308.

The relation between the Agricultural Marketing Agreement Act and State regulation has been an issue in two cases, one involving raisins, the other milk. In *Parker* v. *Brown*, 317 U. S. 341, the U. S. Supreme Court upheld the regulation of raisin prices paid California producers by California processors, partly because it "applied to transactions wholly intrastate" and also partly because of the following circumstances (317 U. S. 358-9):

> "We have no occasion to decide whether the same conclusion would follow if the state program had not been adopted with the collaboration of officials of the Department of Agriculture and aided by loans from

> the Commodity Credit Corporation recommended by the Secretary of Agriculture."

Conversely, in *Hood and Sons* v. *Du Mond*, supra, this Court concluded that State restriction of milk imports was contrary to the Federal statute. In that case this Court pointed out that Section 10 of the Agricultural Marketing Agreement Act (7 U.S.C. 610 (i)) provides for conferences, joint hearings, and cooperation with State authorities. This court then said (336 U. S. 542-3):

> "And the provisions looking to state cooperation may be sufficient to warrant the state in imposing regulations approved by the federal authorities, even if they otherwise run counter to the decisions that coincidence is as fatal as conflict when Congress acts. See *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767. It is, of course, a quite different thing if Congress through its agents finds such restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity."

We do not have a cooperative situation in this case. If anything there is lack of cooperation. The producers, by their vote, have frustrated Federal regulation. In such a situation, it would seem intolerable that the State should regulate any interstate commerce in milk within this area.

Regulation of interstate retail prices inevitably depends upon the interstate producer prices. The Virginia Milk Commission does set producer prices (R-32, 37 to 40). While it says that there is no regulation of producer prices paid by District of Columbia distributors (R-95), it is

difficult to see how it could compute retail and wholesale prices for interstate milk unless on the basis of the prescribed producer prices, particularly as it requires the Virginia distributors to pay such producer prices.

On the other hand, if there were Federal regulation of producer prices, the interstate producer prices would affect retail prices whether intrastate or interstate. This Court has held that, under the Federal Statute, the Secretary of Agriculture can regulate intrastate producer prices because of their effect upon interstate commerce in the same area; see *U. S.* v. *Wrightwood Dairy Co.*, 315 U. S. 110. Therefore, any regulation of retail or wholesale prices, interstate or intrastate in the Arlington area would begin with Federal regulation of producer prices both interstate and intrastate, if there were Federal regulation.

Because of the interrelation of producer prices and the retail and wholesale prices, the State Milk Commission necessarily invades the field occupied by the Federal government in regulating any prices in interstate commerce. Only after exercise of the Federal regulation of producer prices could there be any beginning of State regulation without actual occupancy of the Federal field by the State Milk Commission.

The prior regulation of milk in the Arlington area under the Federal statute, the ouster of such regulation by the producers, and the movement in interstate commerce of most of the milk consumed in the area, should be facts leading to the conclusion that there should be no price regulation of milk traffic in interstate commerce, at least not until the Federal statute should be made effective in the Arlington-Alexandria market area.

III

The Decisions of the Virginia Courts were Based Upon an Erroneous Misconception of the Scope of State Powers to Regulate Interstate Commerce.

The error of the Virginia Courts is believed to have been due primarily to a misconception of the rule, which it followed in this case, that the milk "price regulation in question is not a burden on interstate commerce".(1)

There are extremes in the use of the "burden" rule: On the one hand, there is an extreme view that the States are prohibited from any jurisdiction over interstate commerce. On the other hand, there is the view that a State may regulate any and all interstate commerce so long as the regulation is not burdensome in the sense of being unreasonably oppressive or discriminatory. The Virginia Courts have come close to this latter view in prior decisions reversed by the U. S. Supreme Court. See *Nippert* v. *Richmond*, 327 U. S. 416, reversing 183 Va. 689, 33 S.E. 206; and *Morgan* v. *Virginia*, 328 U. S. 373, reversing 184 Va. 24. As the Virginia courts did not explain their views by an opinion in this milk case, there is no way of knowing whether their conclusion was not based upon views similarly erroneous.

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(1) In a one-paragraph memorandum in this case (R-148) the Virginia Supreme Court of Appeals affirmed a memorandum decision of the Richmond Circuit Court which merely said (R-100 and 101):

> ". . . the court is of opinion that the minimum price regulation in question is not a burden on interstate commerce; that the State Milk Commission can legally fix the minimum sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market Area from trucks of the District of Columbia distributors . . ."

The Court's decree (R-101 and 102) stated that this applied "irrespective of the point of origin of the milk so delivered". The State Milk Commission, after hearing the matter specially on the interstate commerce question, had certified the record to the Richmond Circuit Court without opinion (R-99).

The fundamental principle, established by the Opinion of Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 1, has been that the Commerce Clause is a guarantee of freedom of trade among the States. "The Commerce Clause created the nation-wide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states". *Memphis Stern Laundry* v. *Stone*, 342 U. S. 389, 395. However, if the rule should be established that States may impose price regulation at the crossing of their boundaries, the people will lose another freedom.

Price-fixing is the antithesis of free trade, and the States should not impose price regulation upon commodities crossing their borders unless authorized by Congress to do so. This principle wuld be consistent with the following rule stated by this Court in *Freeman* v. *Hewit*, 329 U. S. 249, 252; which explains this lack of State authority:

> "Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause, even without implementing legislation by Congress is a limitation upon the power of the States. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761; *Morgan* v. *Virginia*, 328 U. S. 373. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history. This limitation on State power, as the *Morgan* case so well illustrates, does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow

> of trade between the States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables."

See also: *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 307-8; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 58-61; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189; *McLeod* v. *Dilworth*, 322 U. S. 327, 349; *Spector Motor Service* v. *O'Connor*, 340 U. S. 602.

Some of the cases state, as in the above quotation, that the field in which the States cannot act is that in which the interstate commerce is "national" in character. But the term "national character" has been defined to include transportation, purchase, sale, and exchange of commodities moving directly in interstate commerce. The following cases support that rule:

> "Interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities is national in its character, and must be governed by a uniform system," and "so long as Congress does not pass any law to regulate it, or allowing the States so to do it thereby indicates its will that such commerce shall be free and untrammelled." *Leisy* v. *Hardin*, 135 U. S. 100, 109-110.
>
> " 'Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by

provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the states which consists of the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. Its nonaction in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity, or by that means of transportation shall be free." *Bowman* v. *Chicago*, 125 U. S. 465, 485.

The distinguishable situations in which a State may regulate interstate commerce as an incident to State regulation should be concerned primarily with the commodity *before* or *after* it has been transported; and the States cannot regulate the incidents of the importation. The distinction is made in the following statements of the U. S. Supreme Court:

"But we think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed *after* coming within the State, but directly upon the business as it comes into the State from without or goes out from within." *Hall* v. *DeCuir*, 95 U. S. 488, 488-9. (Emphasis added.)

"It is enough to say, that the power to regulate or forbid the sale of a commodity *after* it has been brought into the State, does not carry with it the right and

> power to prevent its introduction by transportation from another State." *Bowman* v. *Chicago,* 125 U. S. 465, 500. (Emphasis added.)

Counsel for the State Milk Commission have, in prior proceedings cited cases, in supposed support of their position, which are readily distinquished for the same reason, that the State regulation applied before the interstate movement began. There is *Milk Board* v. *Eisenberg,* 306 U. S. 346, which upheld State regulation of prices paid Pennsylvania producers by Eisenberg company, a Pennsylvania corporation, at its Pennsylvania receiving plant. This regulated transaction was entirely within Pennsylvania, although the milk was later exported to New York. In that case the U. S. Supreme Court said:

> "There is, therefore, a comparatively large field remotely affecting and wholly unrelated to interstate commerce within which the statute operates. These considerations we think justify the conclusion that the effect of the law on interstate commerce is *incidental* and not forbidden by the Constitution in the absence of regulation by Congress." (p. 353.)

There was also the case of *Parker* v. *Brown,* 317 U. S. 341 involving California regulation of prices of raisins paid to California processors. In that case the Court said (317 U. S. 361):

> "Applying that test, the regulation here controls the disposition, including the sale and purchase, of raisins *before* they are processed and packed preparatory to interstate sale and shipment. The regulation is thus applied to transactions wholly intrastate *before* the

raisins are ready for shipment in interstate commerce." (Emphasis added.)

These cases are distinguishable from the instant situation where the Virginia price regulation applies directly to the importation of milk.

Counsel for the State Milk Commission in prior arguments have contended that the District of Columbia distributors were "peddling" milk in Arlington in intrastate commerce. They have cited two cases in support of their contention: *Wagner* v. *Covington*, 251 U. S. 95 and *Caskey Baking Co.* v. *Virginia*, 313 U. S. 117. But these cases really are contrary to the State's position.

Both of the cited cases involved imposition of taxes, one upon a peddler of soft drinks, the other upon a peddler of bread. In both decisions the U. S. Supreme Court emphasized, in almost identical language, that these statutes did not license or tax the activity or transporting the goods across State lines, but rather the purely local business of peddling intrastate *after* the goods were imported (see 251 U. S. 103 and 313 U. S. 119). In both of those cases the sales solicitations and subsequent sale transactions were in the State where the sale and peddling took place.

But in this case the facts are much different. Here the District of Columbia milk distributors did business largely on a pre-order basis before the movement of the milk began across the State boundary. The record shows that about 75 percent of the retail home deliveries filled pre-orders for regular deliveries; the remainder were largely changes in pre-orders, arranged between the consumer and the delivery driver; and about one-half of the consumers paid their monthly bills by checks sent to the distributors in the District of Columbia. About 40 to 50 percent of the wholesale

delivery orders were on a pre-order basis from the two leading District of Columbia distributors. Obviously this business was largely pre-order rather than local peddling.

In the earlier of the two cases previously relied upon by appellee, the U. S. Supreme Court said (251 U. S. 100):

> "It is indisputable that with respect to the goods occasionally carried upon plaintiffs' wagon from one State to the other in response to orders previously received at their place of business in Cincinnati, plaintiffs are engaged in interstate commerce, not subject to the licensing power of the Kentucky municipality."

Therefore, the cases upon which appellee has relied are contrary to its position, and support the contention of appellant in this case.

Counsel for the Virginia State Milk Commission also have attempted to take the position that after the milk crosses the Potomac River and comes into Virginia the movement in interstate commerce ends; and that the subsequent delivery or sale to the consumer even on a pre-order, is not in interstate commerce. There is not enough in the opinions of the State courts to know to what extent the State courts may have agreed with this theory. But an attempt to divide a movement, which was physically and commercially continuous, is obviously erroneous in law and inconsistent with the facts in the case.

The position of the State Milk Commission depends upon an erroneous conception of the status of the sale which is part of the direct movement in interstate commerce from the District of Columbia to Virginia. The fundamental principle was early established as set forth in *Brown* v. *Maryland*, 12 Wheat. 419, in which the U. S. Supreme Court said (446):

> "Commerce is intercourse—one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize this traffic . . . should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part."

The same rule was followed in *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282. That case raised an issue of validity of a Kentucky statute which made unenforceable contracts by corporations not authorized to do business in the state. The corporation in that case sued for breach of contract made in Kentucky to deliver wheat grown in Kentucky on board rail cars at a Kentucky origin, but which the corporation intended to move to its mill in Tennessee. The State court held the contract to have been in intrastate commerce and unenforceable, but the U. S. Supreme Court held to the contrary, saying that it was in interstate commerce (257 U. S. 292), and further stated (257 U. S. 290-1):

> "Where goods in one State are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. *Brown* v. *Maryland,* 12 Wheat. 419, 446-447; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 519. On the same principle, where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. *American Express Co.* v. *Iowa,* 196 U. S. 133, 143. This has been recognized in many decisions construing the commerce

clause. Thus it was said in *Welton* v. *Missouri,* 91 U. S. 275, 280: 'Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all forms, including the transportation, purchase, sale, and exchange of commodities.' In *Kidd* v. *Pearson,* 128 U. S. 1, 20, it was tersely said: 'Buying and selling and the transportation incidental thereto constitute commerce.' In *United States* v. *E. C. Knight Co.,* 156 U. S. 1, 13, 'contracts to buy, sell, or exchange goods to be transported among the several states' were declared 'part of interstate trade or commerce.' And in *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 241, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities.' In no case has the court made any distinction between buying and selling or between buying for transportation to another State and transporting for sale in another State. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling it was not material whether it came first or last.

"A corporation of one State may go into another without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause." . . .

Obviously, under this rule, the direct delivery of milk to Arlington consumers from District of Columbia distributors, following prior agreements for such deliveries between distributors and consumers, is part of interstate commerce.

The movement of milk from the District of Columbia to Arlington consumers does not differ in character from the movement of milk from farmer-producers in Virginia, Maryland, West Virginia, and Pennsylvania to the District of Columbia; both are directly in interstate commerce. But milk moving to the District of Columbia from the producers is not subject to regulation, according to the Virginia Milk Commission (R-95).

The Virginia Milk Commission does assert jurisdiction over prices paid farmer-producers by Virginia distributors in intrastate commerce (R 94-95); but if the Federal regulation were in effect, the jurisdiction over intrastate producer prices would be in the Department of Agriculture; see *U. S.* v. *Wrightwood Dairy Co.*, 315 U. S. 110.

This Court held, in *Highland Farms Dairy* v. *Agnew*, supra, that the Virginia Commission had no jurisdiction over milk prices from District of Columbia distributors to Arlington stores for resale.

When Congress gave the farmer-producers a choice whether there should be Federal regulation (7 U.S.C. 608c (16)), and the Federal regulation was rejected (R 28 A-31), an important part of milk price regulation was eliminated. Coordination of State and Federal schemes was made impossible; there is no statutory authorization for the State to regulate prices which would have been subject to regulation by the Department of Agriculture; and there is no authority in the Federal Statutes for any interstate regulation of milk prices by the States. In giving the farmer-producers a choice whether there should be regulation over

interstate commerce, there now is no statutory justification, neither Federal nor State, for regulation of interstate commerce in milk in the Arlington area.

The conclusion seems clear that Virginia has no jurisdiction over interstate traffic in milk in the Arlington area, and certainly not when there is no Federal regulation with which the State regulation could be correlated.

CONCLUSION

For the above reasons, the following conclusions are offered: (1) that the Virginia Milk and Cream Act does not authorize regulation over interstate traffic in milk from District of Columbia distributors directly to Arlington consumers, and that any regulation of such traffic is in violation of the Commerce Clause of the United States Constitution; and (2) that the State Milk Commission has no authority from Congress to regulate interstate milk prices, particularly in the absence of Federal regulation which was ousted by vote of the farmer-producers in 1947.

Therefore, it is respectfully submitted that the decree and judgment of the Courts below should be reversed.

Respectfully submitted,

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December 1953.

APPENDIX A

EXTRACTS, VIRGINIA MILK AND CREAM ACT, 1950 CODE OF VIRGINIA:

Section 3-359. "The (Virginia Milk) commission, after public hearing and investigation may fix the prices to be paid producers or associations of producers by distributors in any market or markets, may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market, and may also fix different prices for different grades of milk. In determining the reasonableness of prices to be paid or charged in any market or markets for any grade, quantity, or class of milk, the commission shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public."

Section 3-381. "No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto."

APPENDIX B

EXTRACTS: AGRICULTURAL MARKETING AGREEMENT ACT OF 1937, AS AMENDED, TITLE 7, U. S. CODE:

Section 601: It is declared that the disruption of the

orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

Section 608c (1): The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title as "handlers". Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

* * * * * * *

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjust-

ments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for in this section:

* * * * * * *

Section 608c (16) (B): The Secretary (of Agriculture) shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the market-

ing area specified in such marketing agreement or order: Provided, That such majority have, during such representative period, produced for market more than 50 percentum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 percentum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

Section 610 (i): The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624, of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: Provided, That information furnished to the Secretary of Agriculture pursuant to section 608d (1) of this title shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction

of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the porvisions of section 608d (2) of this title.

In The
Supreme Court Of The United States
OCTOBER TERM, 1953

No. 128

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, A BODY CORPORATE, ET AL.,
Appellants,

vs.

STATE MILK COMMISSION

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

APPELLANTS' MEMORANDUM REPLY AS TO JURISDICTION

The following is submitted for appellant in reply to the portion of appellee's brief as to jurisdiction.

Appellee questions the jurisdiction of the U. S. Supreme Court to entertain this appeal on the contention that "appel-

lants have insufficient legal right or interest" to give them standing to appeal.

To be noted is the fact that this question was never raised before, neither by appellee in the courts below (R. 49-50, 128-148), nor in the decisions of the courts below (R. 50-52, 100-101, 148). As a matter of fact, everything below dealt with the question of interstate commerce, and no other issue was actually tried or subject of dispute or decision. It is significant that the State courts did not find any lack of capacity in appellants to try this matter in the State courts.

Appellee's counsel cite a number of cases in their brief (page 2) none of which need be considered as grounds for denying jurisdiction. None of the cases deal with the right of a local governing body to represent its citizens. This may be noted from the Revisors Notes, *U. S. Code Congressional Service*, page 1825. The remainder of the cases deal with appeals from orders of the Interstate Commerce Commission, which were governed by a different statute, not applicable to this case, brought forward in section 2323 of the present Judicial Code, Title 28 U. S. C. That statute restricted the parties which could obtain judicial review, and has been narrowly construed, as those cases show.

Jurisdiction in this case is conferred by section 1257, supra, which does not limit appeals by qualification of parties, and is very broad in conferring complete discretionary powers upon this Court to review decisions of State courts on constitutional grounds. That section reads as follows:

> Sec. 1257. "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as

follows:

* * * * * * *

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity."

There is no language in the statute which would justify the narrow limitation sought by appellee, nor any decisions to this effect under the above language, so far as the writer of this reply has been able to find.

As constitutional rights of a large group of people are involved, the Court should be sensitive to the practicalities involved. Assume, for illustration, that the average family in Arlington consumes two quarts of milk per day, or twice 365 quarts per year. The increase of price prescribed by appellee, in the order here questioned, was one-half cent per quart, or $3.65 per year for such family. This is too small an amount to justify any individual consumer litigating the constitutional question, nor even a large number of them. But multiplied by the 40,000 households in Arlington, the total sum is very large.

For every $1,000 spent in this appeal, the cost per Arlington family is only about 2½ cents. Collective action through the County Board provides a practical remedy; about the only practical remedy which the consumers actually have available.

The Arlington County Board, a responsible, continuing body corporate, consisting of elected representatives of the voters, and themselves representative consumers, is the

logical party to bring this sort of action. While it would be abhorrent of them to spend public funds merely to litigate their own personal interests as consumers, as a Board they can truly represent the people of the County in the preservation of their Constitutional rights.

The right of representatives to bring actions is not new. In the Girard College Case, *Vidal et al.* v. *Girard's Executors,* 2 Howard 127, 195, Justice Story pointed out the old rule of common law that the " 'king, as parens patriae, has a right by his proper officers, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases.' " Surely, constitutional rights are no less important than administration of charities.'

The right of representative parties to sue has been recognized by this Court in exceptional cases where numerous persons are involved, where it is impractical to bring them all before the court, and where the party bringing the action "may fairly be presumed to represent the rights and interests of the whole." *Smith et al* v. *Swormstedt* (the Methodist Book Concern case) 16 Howard 288, 302. Certainly, appellant County Board should qualify under this rule.

In *Hood & Sons* v. *Du Mond,* 336 U.S. 525, involving application of the Commerce Clause to milk regulation by a State, this Court said:

> "Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploit tion by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality."

But there will be no reality to this constitutional guarantee of freedom of trade and competition if this Court denies to the people of Arlington their only practical legal action to determine the issue.

Therefore, this Court is urged to follow the example of the Virginia courts by determining this case on the issues under the Commerce Clause, and not upon any technicality which would deny practical protection of the constitution to all residents of Arlington.

Respectfully submitted,

MALCOLM D. MILLER,
Attorney for appellants.

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vs.

STATE MILK COMMISSION

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

APPELLANT'S REPLY TO APPELLEE'S SUPPLEMENTAL BRIEF AFTER ARGUMENT

Appellee contends, in supplemental brief, that the Arlington County Board "lacks status to prosecute the appeal."

To the contrary, the Arlington County Board contends that the U. S. Supreme Court has jurisdiction in this appeal, for the following reasons:

(1) Jurisdiction is conferred by Section 1257 (2) of the Judicial Code, Title 28, U. S. Code.

(2) The Arlington County Board is a proper party to raise the constitutional issue.

In both of these contentions, the argument is made that the Court has jurisdiction by reason of the action of the State courts, and that the question of the capacity of the Board to be appellant should not be raised at this stage in the proceeding.

ARGUMENT

I.

Jurisdiction Is Conferred By Section 1257 (2) Of The Judicial Code, Title 28 U. S. Code.

This Court has jurisdiction to entertain this appeal by reason of the provisions of Section 1257 of the Judicial Code, Title 28, U.S.C., which reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . . . .
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Under this section, it is clear that the only condition precedent to jurisdiction of this court is a decision of the highest court of the State upholding the validity of a State statute as against a contention that it violated Federal law. Such is the case here.

Under Section 1257 (2) there is no jurisdictional require-

ment with respect to parties nor with respect to any other procedural or remedial problem connected with the State court decision. Where the State courts have concerned themselves entirely with the merits of the Constitutional issue affecting the validity of the State statute, that is the only question here on appeal. The remedial procedure allowed by the State should be respected. In *First Nat. Bank* v. *Anderson*, 269 U. S. 341, 346, this Court said:

> "The Supreme Court of the State treated the case as cognizable in equity and perceived no obstacle to a consideration of the merits as displayed in the petition. In this that court was proceeding within limits where the state laws and practice were controlling, and its action is not open to revision here. In cases coming from state courts this Court's power and concern are specially directed to rulings made or refused on federal questions.

Under this rule, if the State has provided a remedy by which the Arlington County Board could test the validity of the State statute, attacked on Constitutional grounds, then there should be no reason why the U. S. Supreme Court should refuse to review the matter on appeal.

By concerning itself only with the issues decided by the State court, the U. S. Supreme Court would reach two desirable results: On the one hand, it would give "full faith and credit" to State procedural and remedial matters, and give full recognition of States' rights in these matters. On the other hand, the U. S. Supreme Court would relieve itself of the necessity of considering procedural and remedial intricacies by concerning itself only with the question of conflict of Federal and State laws. As Section 1257 is permissive, in use of the words "may be reviewed", the

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Court may exercise its discretion to dismiss an appeal which lacks merit on the Federal question.

Counsel for appellee does not refer to Section 1257 in its supplemental brief nor to any of the provisions of the Judicial Code affecting jurisdiction. Cases are cited without regard to the particular jurisdictional statutes involved, and citations of precedents are misleading because not related to the applicable statutes. For example, appellee cites *Smith* v. *Indiana,* 191 U.S. 138; but that decision states that no Constitutional issue was raised in the State courts, and therefore section 1257 (2) of its antecedent statutes could not have been the basis for jurisdiction, regardless of the interest of the appellant, because no Federal question was involved in the decision of the State court upholding of the State law.

Two other cases cited by appellee did not even involve appeals from State courts, but involved the jurisdiction of the Federal Courts to review orders of the Interstate Commerce Commission; *Moffat Tunnel League* v. *United States,* 289 U. S. 113, and *Edward Hines Yellow Pines, Trustees,* v. *United States,* 263 U.S. 143. In those cases the jurisdictional and procedural statute was the Urgent Deficiencies Act of 1913, carried forward into sections 2321 to 2325 of the Judicial Code, Title 28 U.S.C. Section 2323 specifies the parties which may enter the Federal proceedings, and the question of parties is a Federal question involving only Federal law. Section 1257 (2) of the Judicial Code could not possibly have been involved in those cases.

Appellee also confuses decisions holding that there is no Federal question involved in a case, which is entirely different from the capacity of a litigant to be an appellant. Those cases have no relevance to the problem which the Chief Justice assigned to appellee's counsel; *Pawhuska* v. *Paw-*

huska Oil & Gas Co., 250 U.S. 394; *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-op Assn.*, 276 U.S. 70; *Williams* v. *Mayor and City Council of Baltimore*, 289 U.S. 36; *Trenton* v. *New Jersey*, 262 U.S. 182. Furthermore, the Baltimore case did not involve any decision of a State court, the action began in Federal district court. The New Jersey case is actually contrary to appellee's position, because there the U.S. Supreme Court allowed the City of Trenton to be appellant in a case against the State, and decided the case on the merits of the Constitutional defense.

The price-fixing order of the Virginia Milk Commission, involved in this case was legislative in nature, and hence is a State statute within the meaning of Section 1257 (2); see *Lake Erie & W. R. R. Co.* v. *Pub. Util. Comm.*, 249 U.S. 422, 424; *Live Oak Assn.* v. *R. R. Comm.*, 269 U.S. 354, 356; *Hamilton* v. *Regents*, 293 U.S. 245, 257-8. The "validity" of a State statute is sustained by State courts, for the jurisdictional purposes of Section 1257, when held applicable to a particular set of facts as against the contention that such application is in violation of the Commerce Clause of the U. S. Constitution; *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282, 287-290.

In this case, the State Milk Commission and the State courts have construed a statute as applicable to interstate commerce, in a manner which appellant has contended is contrary to the Commerce Clause of the U. S. Constitution, within a field in which the States have no jurisdiction whatsoever. The interpretation of the law by the State Milk Commission is found at pages 94-95 of the record. This interpretation was upheld by the Circuit Court of the City of Richmond, which issued a decree saying (R. 102):

> "Upon consideration whereof, it appearing to the Court that the Arlington-Alexandria Order No. 4,

> establishing a minimum sale price for milk in the Virginia Arlington-Alexandria Market Area, does not constitute an unconstitutional burden on interstate commerce and that the State Milk Commission can lawfully establish the minimum sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market area, irrespective of the point of origin of the milk so delivered."

In its letter opinion (R. 101), the Circuit Court said that the price could be fixed by the State Milk Commission on milk "sold and delivered to consumers in the Arlington-Alexandria Market Area from trucks of the District of Columbia distributors."

The Virginia Supreme Court of appeals held (R. 148):

> "The petition of The County Board of Arlington County, Virginia, for an appeal from a decree entered by the Circuit Court of the City of Richmond on the 22nd day of July, 1952, in a certain proceeding then therein depending, wherein the said petitioner was plaintiff and State Milk Commission was defendant, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the said decree is plainly right, doth reject said petition and refuse said appeal, the effect of which is to affirm the decree of the said circuit court."

As brief as this statement is, the fact is clear that the Virginia Supreme Court ruled upon the merits of the case. It will be noted that the petition for appeal and the answer of the Attorney General dealt only with the merits of the case,

and not with any procedural or remedial questions (R. 105-148).

From the foregoing, it is clear that the *requirements* for jurisdiction in Section 1257 (2) of the Judicial Code have been satisfied, and that this court may properly entertain an appeal.

II.

The Arlington County Board Is A Proper Party To Raise The Constitutional Issue.

As previously argued, the capacity of the Arlington County Board to invoke the Constitutional guarantee of free trade is a remedial and procedural matter for the State courts, and decision by the State Supreme Court is all that was *required* to appeal the matter to the U. S. Supreme Court under Section 1257 of the Judicial Code.

On the other hand, an explanation of the status of the Arlington County Board should make clear that it was a proper appellant in this case.

The supplemental brief of appellant's counsel overlooks much of Virginia law applying to the instant situation. First of all, counsel overlooks the fact that Arlington County is governed by a special statute prescribing the County Manager Plan of government applicable only to Arlington County; Title 15, Chapter 12, Section 15-350 et seq. Code of Virginia, 1950. There are many other special statutes also applying only to Arlington, not readily recognized as such. The governing body is designated the "County Board", and is a "body corporate" with power to sue and be sued. It has the general powers of counties

(and also of cities), and under section 15-8 (5) of the Code of Virginia, 1950, has the following powers:

> "To adopt such measures as they may deem expedient to secure and promote the health, safety, and general welfare of the inhabitants of their respective counties, not inconsistent with the general laws of this State."

The appellee does not deny that this appeal is within the discretion of appellant to secure and promote the general welfare of the inhabitants of the county; but appellee merely contends that this appeal is inconsistent with the general laws of the State. However, appellee does not cite any statute of Virginia nor decision of any Virginia Court to that effect.

To the contrary, however, the Virginia Courts have allowed the Arlington County Board, as well as other similar governing bodies, to attack an order of a State commission. For example, in *"Board of Supervisors of Arlington County, etc.,* v. *Commonwealth of Virginia, ex rel., The Chesapeake and Potomac Telephone Company of Virginia,"* 186 Va. 963, the Arlington County Board was allowed to appeal an order of the State Corporation Commission increasing telephone rates. The writer of this brief knows of his own personal knowledge that this was done at the insistence of the consumers residing in the county and for their protection. See also a similar case in *Norfolk* v. *Chesapeake, etc., Tel. Co.,* 192 Va. 292. In those cases there was no question of the right of the county and municipalities to appeal the case, and the decisions were upon the merits.

One reason why there has been no question of the capacity of the public bodies to appeal the orders of State commissions is the fact that the remedial appeal statutes are

similar to the Virginia Milk and Cream Act in that they give the right of appeal to "any person aggrieved"; section 3-369, Virginia Code of 1950. The Virginia Supreme Court has said: "The term 'aggrieved' is broader in its scope than the term 'party in interest' . . . .", *Commonwealth* v. *Sharp*, 155 Va. 714, 717.

Representation of consumer interests is a continuous and regular function of the Arlington County Board. It has an official Public Utilities Commission, with a paid staff, which advises the County Board in these matters, but does not have regulatory powers. This Public Utilities Commission has been in existence for a long time, long before the milk case developed. It advises the Board upon milk regulatory matters. On a state-wide basis, the Arlington County Board joins with cities of the State in public utility matters through its membership in the Virginia League of Municipalities, and it is a function of the League to intervene in regulatory matters for protection of inhabitants of these urban areas on a Statewide basis. This practice has been in existence for a long time in Virginia, and has not been regarded as inconsistent with State law. The above-cited cases of the Virginia Supreme Court show that the practice is considered proper.

Neither is there anything inconsistent with Federal law in suit by one branch of the government against another; this Court so held in *United States* v. *I. C. C.*, 337 U.S. 426, 430-432, in which the U. S. government sued itself to appeal an order of the Interstate Commerce Commission. Likewise, in *Trenton* v. *New Jersey*, 262 U.S. 182, this court allowed the City of Trenton to be appellant in a case against the State of New Jersey, and decided the case upon the merits of a contention that it had certain water rights protected against the State by the Contract Clause of the U. S.

Constitution. The capacity of the City of Trenton to appeal was not questioned in that case.

Appellee cites *Moffat Tunnel League* v. *U. S.*, 289 U.S. 113, which involved an appeal of an I. C. C. order. The Court held that the League could not appeal because it was a voluntary association which had no power to sue and be sued, and hence could not appeal. But the court also said (289 U.S. at page 119):

> "Consequently the complainant must show that plaintiff has, *or represents others* having, a legal right or interest that may be injuriously affected by the order."

Furthermore, the Court also indicated that if the suit had resulted from official action of the two county boards, the court might have found such proper representation (see 289 U.S. at page 118).

As a practical matter, Arlington consumers have no remedy to protect their constitutional right of freedom to trade in interstate commerce unless the County Board is permitted to appeal on their behalf. Assume, for illustration, that the average family in Arlington consumes two quarts of milk per day, or twice 365 quarts per year. The increase of price prescribed by appellee, in the order here questioned, was one-half cent per quart, or $3.65 per year for such family. These consumers would have a "legal interest" to appeal, *Youngstown Co.* v. *United States*, 295 U.S. 476, 479, but this interest cannot be protected by appeal to this Court as a practical matter, because it involves too small a sum. Collectively, however, the 40,000 households in Arlington could appeal through the County Board for only 2 1/2

cents each for every $1,000 spent in this appeal; and in this manner a practical remedy becomes available.

On the other hand, the one-half cent per quart is a large sum in the total for each distributor. There is no doubt about their rights to appeal to this court on the grounds of confiscation or violation of the Commerce Clause. Furthermore, the cost of the appeal would come from the sums collected from the consumers for the milk involved in the appeal.

Unless a practical remedy for appeal is made available, then a discriminary situation would result. If it is a practical impossibility for consumers to appeal, leaving the distributors with a practical remedy, then only one side to the controversy actually has Constitutional protection. As the constitutional rights of a large group of people are involved, the Court should be sensitive to the practicalities involved, and should review the case on its merits.

The right of representative parties to sue has been recognized by this Court in exceptional cases where numerous persons are involved, where it is impractical to bring them all before the court, and where the party bringing the action "may fairly be presumed to represent the rights and interests of the whole." *Smith et al* v. *Swormstedt*, 16 Howard 288, 302. Certainly, appellant County Board should qualify under this rule.

In *Hood & Sons* v. *Du Mond*, 336 U.S. 525, involving application of the Commerce Clause to milk regulation by a State, this Court said:

> "Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality."

But there will be no reality to this constitutional guarantee of freedom of trade and competition if this Court denies to the people of Arlington their only practical legal remedy to determine the issue.

The right of government to represent citizens is not new. In the Girard College Case, *Vidal et al* v. *Girard's Executors*, 2 Howard 127, 195, Justice Story pointed out the old rule of common law that the "king, as parens patriae, has a right by his proper officers, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases." Surely, constitutional rights are no less important than administration of charities!

It is the position of the Arlington County Board that it may use its discretion in this case to exercise its statutory power to sue as a corporate body to carry out its statutory duty to "secure and promote" the "general welfare of the inhabitants" of the county; and that when the State courts allow this action, then the U. S. Supreme Court should take jurisdiction under Section 1257 (2) of the Judicial Code, without questioning the right of the County Board to be the appellant.

CONCLUSION

It is the position of Arlington County Board that the U. S. Supreme Court has jurisdiction of the appeal in this case by reason of the provisions of Section 1257 of the Judicial Code; that the remedial and procedural matters leading to decision of the State Courts is not subject to attack at this stage of the proceeding, and that because of

the public importance of the issues, the Court should determine the Constitutional issues upon their merits.

As oral argument in the above question took much of the limited time from argument of the Commerce Clause subject, appellant suggests that further oral argument may be helpful to the Court.

Respectfully submitted,

MALCOLM D. MILLER
Attorney for the Arlington County Board

FILED
JUN 16 195
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 128

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, A BODY CORPORATE, ET AL.,
Appellants,

VS.

STATE MILK COMMISSION

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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No. 128

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, A BODY CORPORATE, ET AL.,

Appellants,

VS.

STATE MILK COMMISSION OF THE COMMONWEALTH OF VIRGINIA,

Appellee.

MOTION TO DISMISS OR AFFIRM AND APPELLEE'S COUNTER STATEMENT AS TO JURISDICTION

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Motion to Dismiss or Affirm

Comes now the appellee, State Milk Commission of the Commonwealth of Virginia, by its undersigned counsel, and moves this Honorable Court that it dismiss the appeal heretofore granted in this case, or, in the alternative, affirm the judgment of the courts below.

For cause of this motion the appellee says that the question involved is not substantial within the meaning of this

Honorable Court's Rule 12 and the cases of *MacArthur* v. *United States*, 315 U. S. 787 and *Zucht* v. *King*, 260 U. S. 174, as appears from the appellee's counterstatement as to jurisdiction hereinafter set forth.

Appellee's Counterstatement as to Jurisdiction

I. The Facts

The record in the court below which will be transmitted to this Honorable Court, contains the transcript of the hearings before the State Milk Commission. The facts shown by that record, insofar as material, may be summarized as follows:

A typical dairy, Chestnut Farms Dairy, sold at wholesale and retail in this market 13.77% of its total sales and sold 33% of the total sales in this area. Chestnut Farms Dairy purchases milk from Virginia, Maryland, West Virginia and some from Pennsylvania. It purchased 46.09% of its total purchases in the State of Virginia. Chestnut Farms Dairy purchased from Virginia 53.45% of all the milk that was purchased in Virginia by all distributors in the Arlington-Alexandria and Manassas market area and the District of Columbia. 28.09% of all its Virginia purchases was sold by Chestnut Farms Dairy in this market area.

The Virginia milk purchased by Chestnut Farms was processed, along with all other milk purchased, at its plant in the District of Columbia. The milk and other dairy products thus processed were loaded on trucks at its plant in the District of Columbia and sales were made from these trucks in this market area both at wholesale and at retail.

Chestnut Farms operates 15 or 20 truck routes in the Arlington market area. The drivers in charge of the trucks are in reality salesmen and solicitors. These men solicit from door to door and from store to store selling their product. They are paid on a commission basis with a guaranteed

minimum salary. When the driver starts out with his truck in the morning he does not know the volume that he will sell that day. He sells to the stores whatever the store manager or store owner elects to buy that day. He usually makes his collections daily from the stores or restaurants and collects from the various doorstep deliveries weekly or monthly. It is the practice of the Chestnut Farms to keep additional trucks ready at the plant to supply the emergency sales made by the various truck driver-solicitors in excess of their truck loads. The driver 'phones in and meets his new supply at an appointed place and the driver-solicitor proceeds from there for his additional sale. True it is that the doorstep home owner consumer is more regular in his purchases to the extent that there is usually a standing order for one or two quarts, etc., but even these are increased or entirely cut off from time to time by notes or memoranda at the doorstep. The driver-solicitor leaves a bill at the doorstep and is paid at the doorstep and keeps his own book of account and records in his truck. It is true that there are some substantial number of individual consumers who send monthly checks direct to Chestnut Farms Dairy in Washington in payment of their milk bills. It is true also that Chestnut Farms Dairy does not have a processing plant or a receiving plant in the State of Virginia or in this market area. For all practical purposes the truck is the store from which the sales are made and the driver is the solicitor, salesman and store clerk through whom the merchandise is sold and delivered to the consumer or customer and payment made therefor. Approximately 50% of the total milk sold by Chestnut Farms Dairy in this marketing area in Virginia is sold at wholesale and 50% at the doorstep.

In the year 1950 Chestnut Farms Dairy paid an income tax to the State of Virginia in the sum of $16,333.00 on business done in Virginia. In addition it paid for business and

store licenses on the trucks the same being in the nature of peddlers licenses the sum of $6,762.00. Items in similar amounts have been paid for many years. The District of Columbia for many years through its taxing authority has recognized this volume of business as done in Virginia and has not taxed that volume as business done in the District of Columbia. The testimony indicates that Thompson's Dairy, the next largest dairy in this area, operates in the same fashion buying 55% of its total milk in Virginia and selling 23% of its total sales in this market area.

The Lucerne Milk Company which is a trade name for the milk division of Safeway Stores receives its milk from shippers in Maryland and Virginia through the Maryland and Virginia Milk Producers' Association at its plant in the District of Columbia. The milk is processed there and packaged. Safeway transports milk from its District plant to its Virginia stores. It sold in this market area 17.09% of its total milk sales in the metropolitan Washington area. It sold 10½% of all Virginia sales and purchased from Virginia producers 15.03% of its total purchases of milk. Its Virginia sales amounted to 11.6% of its Virginia purchases. Safeway has no milk routes in Virginia but distributes all of its dairy products direct to retail customers coming to its stores. Safeway operates its trucks that deliver the milk from the Washington processing plant to its various stores in Virginia on the same commission basis for the truck driver as route salesmen and wholesale drivers of other distributors. All of these truck driver salesmen are in the same Union and are employed under the same Union contract as is applicable to the entire milk distributing industry in this area.

Chestnut Farms Chevy Chase Dairy, Thompson's Dairy, Lucerne Milk Company and the Milk Division of Safeway Stores are the principal distributors who offered testimony in this proceeding. They raised no question of the right

of respondent to fix minimum prices nor did they or do they contend that the fixing of a minimum sales price is a burden on them or on interstate commerce.

II. The Law

It is the contention of appellee that the State of Virginia can and has authorized the Milk Commission to regulate the sale price of milk sold under these circumstances and that such a regulation does not place a burden upon interstate commerce.

Further it is the contention of appellee that the sales in question are Virginia transactions and not transactions in interstate commerce; that even if they were in interstate commerce the fixing of minimum prices is not a burden on interstate commerce; and even if it were the burden is not undue and is still within police power of the state to protect its milk industry in the state by such regulations.

These contentions seem so well established by decisions of this Honorable Court, to prohibit the raising of a substantial question on this appeal.

A. The Sale of Milk by Chestnut Farms Dairy in the Arlington Market Area Is Local and Is Subject to the Control of the Act.

From the aforegoing facts it is obvious that all the sales of Chestnut Farms Dairy and similar dairies are local in Virginia, whether made to wholesale or retail customers. It is interesting to observe that while counsel for the Arlington County Board of Commissioners could have contended and did originally contend that both types of sales were in Interstate Commerce, he has in the court below not done so with respect to wholesale sales. He now, therefore, confines his thesis to the contention that the transportation and sale from trucks of distributors in the District of Columbia to door steps of *consumers* in Arlington is in Interstate Com-

merce and therefore the Virginia Milk Commission has no authority to fix a minimum resale price therefor. Just why sale by distributors to wholesalers should not be in Interstate Commerce while sales to consumers under identical same circumstances should be in Interstate Commerce is not clear.

On this point it would seem that the case of *Wagner* v. *Covington*, 251 U. S. 101, should be more than controlling. Plaintiffs, manufacturers of soft drinks in Cincinnati, Ohio, sold in Covington, Kentucky, from their vehicle to various purchasers such soft drinks as the purchasers might need from time to time. The trucks carried sufficient drinks to meet the probable demands of customers but with the exception of occasional small amounts carried for delivery in response to particular orders previously received at plaintiffs' plant of business in Cincinnati, all of the sales in Covington were made from the vehicle by the driver. Sometimes the driver sold his entire supply or only part of it. The sales were made in the bottles as filled in Ohio. The driver collected cash from time to time from his customers. The statement of facts in this case are almost identical with the testimony in the case at bar. In upholding the right of the City of Covington to tax the plaintiff and to recover license fees from them under certain city ordinances the Court said:

> "If in respect to this portion of their business, plaintiffs may be subjected to the regulatory power of the state acting through the municipality, we are not concerned with the question whether the general language of the ordinances, if applied with respect to some other method of dealing with goods brought from state to state might be repugnant to the Federal Constitution.
>
> "From the facts recited it is evident that, in essence, that part of plaintiffs' business which is subjected to regulation is the business of itinerant vendor or peddler,—a travelling from place to place within the state,

selling goods that are carried about with the seller for the purpose. * * *

"Of course, the transportation of plaintiffs' goods across the state line is of itself Interstate Commerce; but it is not this that is taxed by the City of Covington, nor is such Commerce a part of the business that is taxed, or anything more than a preparation for it. *So far as the itinerant vending is concerned, the goods might just as well been manufactured within the State of Kentucky;* to the extent that plaintiffs dispose of their goods in that kind of sales, they made them the subject of local commerce, and this being so, they can claim no immunity from local regulation, whether the goods remain in original packages or not."

Apropos of the emphasis supplied above, it might be observed that the milk was bought from Virginia producers in excess of the amounts so sold in Virginia.

The case of *Caskey Baking Company, Inc.* v. *Commonwealth of Virginia,* 313 U. S. 117, decides the same question with respect to bread brought from West Virginia bakeries and sold in the State of Virginia.

It must be remembered that in the record before the Commission the Chestnut Farms Dairy takes out a peddlers or store license on every one of its trucks that operates these truck routes in Virginia and paid in such license fees on those trucks a sum in excess of $6,000.00 in the year 1950. How then could Chestnut Farms Dairy contend in one breath that it was engaged in retail selling from trucks licensed under store licenses and in the next moment contend that it was engaged in Interstate Commerce as to that milk so sold. Chestnut Farms Dairy pays to Arlington County and to Alexandria County each $150.00 peddlers (or store) license fee per year per truck. *Does it not seem to be the height of inconsistency for Arlington County to contend that it is collecting those license fees illegally by arguing*

that these trucks are engaged in selling in Interstate Commerce.

B. Does the Processing and Bottling of Virginia Milk Outside of Virginia for Sale and Delivery in Virginia Create Interstate Commerce.

Chestnut Farms, for example, purchased from Virginia Producers 46% of its total milk supply. It sold in Virginia 28.09% of its Virginia purchases. It must be obvious that Chestnut Farms merely processes in bottles in the District of Columbia about half of its Virginia purchases and returns the milk to Virginia for sale. Suppose that Alexandria Dairy, a dairy under the jurisdiction of appellee, which purchases all its milk from Virginia Producers and sells all of its milk in Virginia, merely transported from a receiving station in Virginia a substantial portion of its milk supply to a processing and bottling plant in the District of Columbia and returned it in its own trucks to Virginia, could it then be contended that Alexandria Dairy is engaged in Interstate Commerce and would not be bound by the minimum price provision. Could it be argued for a moment, that by so doing, Alexandria Dairy could relieve itself of its obligations to comply with the Virginia milk statute and the decisions of this Commission? To ask the question is to answer it. Obviously it could not. It is difficult to see how Chestnut Farms or any other distributor can avoid the jurisdiction of the Milk Commission in view of the foregoing statistics.

C. This Appeal Is Disposed of by the Cases of Highland Farms Dairy v. Agnew; Nebbia v. New York, and Hood v. Du Mond, in this Court.

Counsel for the appellants seems to ignore almost entirely the real meaning of the decision of the United States

Supreme Court in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, in which decision the Court upheld *in toto* the Milk Commission Act of Virginia, the same being Chapter 17 Article 2 Code of Virginia. This Act is almost identical, certainly so far as the fixing of minimum and maximum resale prices is concerned, with the Acts of New York, Pennsylvania and various other forward looking States, all of which have been sustained by the Supreme Court of the United States and will be referred to later.

The Act creating the Milk Commission for Virginia defines "distributor" with an additional definition than that referred to in the *Agnew* case as follows:

> "Distributor means any of the following persons engaged in the business of distributing, marketing *or in any manner handling fluid milk*, in whole or in part in fluid form for consumption in this State:
>
> I. Persons, irrespective of whether any such person is a producer:
>
> (a) who pasteurize or bottle milk or process milk into fluid milk.
>
> (b) who sell or market fluid milk at wholesale or retail,
>
> (1) to hotels, restaurants, stores or other establishments for consumption on the premises,
>
> (2) to stores or other establishments for resale,
>
> (3) to *consumers*."

The Act then provides that distributors shall be licensed. These D. C. distributors are so licensed. The Act then provides that maximum and minimum prices are to be fixed by the Commission with which all distributors must comply.

In considering this statute this Honorable Court in affirming the District Court for the United States for the Eastern District of Virginia in 300 U. S. 614 said:

> "The Statute does not lay a burden on interstate commerce."

The contention made by appellants as to the meaning of the word "distributor" in that case is then answered. The definition of the word distributor discussed in the opinion is the second paragraph of the definition and not the one cited above. In the *Agnew* case it was agreed that Highland in the District of Columbia bought milk and sold in interstate commerce. He sold it to a man by the name of High who resold it in Virginia and thus became a distributor. This Court very appropriately said:

> "Highland in Washington may sell to High in Virginia and High may buy from Highland at any price they please. Not till the milk is resold in Virginia within a market area will the price minimum apply, and then only to the price to be charged on resale [the Court citing among other cases, *Baldwin* vs. *G. A. F. Seelig*, 294 U. S. 511, which will be referred to later]."

Counsel in his memorandum before the lower Court comments on this decision as follows:

> "There is no essential difference between Highland and High and between the Thompson Dairy (likewise Chestnut Farms) and the writer of this brief who receives their milk at his doorstep."

The writer is completely in error. The writer of the brief is a consumer. High in the *Agnew* case was a distributor. Highland was admittedly in interstate commerce. The purchase and sale was by High, a distributor, from Highland also a distributor in the District of Columbia. The more apt comparison the writer could have made would have been to have compared the *Agnew* case to Safeway, which purchases and processes its milk in the District of Columbia as the Lucerne Milk Company and delivers and sells its milk through its stores in Virginia. Counsel for appellants seems

to concede that Safeway's operation comes within the Virginia Statute.

The *Agnew* opinion then goes on to say at 300 U. S. 614-15:

> "No matter what the definition of a distributor may be, sales are not affected by any restriction as to price unless made within the boundaries of a designated market area."

Why is it that counsel for appellants concedes that sales made by Chestnut Farms and Thompson's trucks to stores and restaurants (which trucks carry a peddler's or store licenses) are within the jurisdiction of the Commission, but sales made from the same trucks to consumers are not within its jurisdiction? The evidence shows that the sales are made under identically the same conditions. Certainly milk delivered to a restaurant in fluid form is delivered "for consumption" in the State. Is there any difference between the consumer on the doorstep and the consumer in the restaurant? Of course, a restaurant too is a consumer as well.

Counsel for appellants in his statement as to jurisdiction seems to have overlooked entirely the decision of the highest Court of the State of Virginia upholding the price fixing provision of this Act. In *Reynolds* v. *Milk Commission*, 163 Virginia 957, the Supreme Court of Appeals passed upon the validity of this statute in a case in which it was sought to enjoin the distributors from selling milk at a price lower than the prescribed minimum. Commenting upon that decision this Court said in the *Agnew* case, 300 U. S. 613 "*a judgment by the highest Court of a State as to the meaning and effect of its own constitution is decisive and controlling everywhere.*"

The decision of this Honorable Court in the case of *Nebbia* vs. *New York*, 291 U. S. 502-559 sustaining the New York Milk Law on all constitutional points in 1933 would seem to be a total and complete answer to the contention

of counsel in his memorandum. The New York law was promulgated by the Legislature of New York after a long investigation into the industry from every standpoint. The entire question of its constitutionality so far as the police power of the State to control the industry was concerned, the production and importation of milk into the State of New York, the fixing of minimum prices was squarely presented.

It is impossible in this memorandum to quote the various paragraphs in the *Nebbia* case that completely answer counsel's contention. The New York Milk Act was the forerunner of all similar Milk Control Acts thereafter passed in many of the Eastern States. Every constitutional objection including the interstate commerce question was raised in that case. That Act provided for minimum resale prices of which complaint is made here. In one sentence, 291 U. S. at 537, this Court completely answered counsel's contention:

> "But there can be no doubt that upon appropriate action and by appropriate measures the State may regulate a business in any of its aspects including the prices to be charged for the products or commodities it sells."

This Court also said, 291 U. S. at 538:

> "Where the public interest was deemed to require the fixing of minimum prices that expedient has been sustained. If the lawmaking body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumers' interest, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or protend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because

> the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, *is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt*, and hence an unnecessary and unwarranted interference with individual liberty." (Emphasis added.)

The *Nebbia* case holds that it is within the police power of a state to protect its milk industry from price-cutting and evil trade practices in order that producers, distributors and consumers might have an adequate supply of wholesome milk at a price that will insure continued and adequate production. The action of the Milk Board in fixing a minimum retail price for all milk is in no way discriminatory or irrelevant to the policy of such legislation. If so-called "interstate commerce milk" could be brought in from other states and sold on a cut-price basis in Virginia, the state would soon become a dumping ground for surplus milk at various seasons, the whole price structure would be destroyed and the legislature of Virginia would be wholly unable to protect the very industry that the *Nebbia* case says it has a right to protect.

The opinion of this Court in *Hood* v. *Du Mond*, 336 U. S. 529, referring to the *Nebbia* case says:

> "Production and distribution of milk are so intimately related to public health and welfare that the need for regulation to protect those interests has long been recognized and is, from a Constitutional stand-

point hardly controversial. Also the economy of the industry is so eccentric that economic controls have been found at once necessary and difficult. These have involved, detailed, intricate and comprehensive regulations, including price fixing."

D. The Fixing of Minimum Sale Prices Is Not a Burden on Interstate Commerce Because Not Undue or Discriminatory.

In the memorandum of counsel there are cited many cases that are entirely appropriate in their setting but many of them state principles with respect to so-called regulations of interstate commerce that have long since been outmoded. Many of the cases on the subject have used the words "restraints", "obstructions", "in commerce", "on commerce", "burdens", "direct burdens", "undue burdens", "unreasonable burdens", "unfair burdens", "incidental burdens", but such words have almost always been used as the opinions show to aid the Court in trying to balance the right of a State to regulate a business such as the milk industry under its police power and at the same time not to discriminate against interstate commerce in that same industry. *There is no question but that a State may appropriately place some burden upon interstate commerce.* There is no case in the books which is a better illustration of this fact than this Honorable Court's decision in *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 349,

In that case the Pennsylvania Milk Control Law required a State license of all persons who handled or purchased milk within the Commonwealth for sale *within or without* the Commonwealth. It required all dealers, interstate and intrastate, to keep records and to give bonds for payment to producers. Dealers who sold milk within or without the State were required to pay state-fixed prices. The purpose was the protection of milk farms in Pennsylvania from

what were deemed to be the evils of cutthroat competition. The law was applied against Eisenberg who handled and operated a milk receiving plant in Pennsylvania where the milk was weighed, tested and cooled preparatory to shipment to New York. Unquestionably Eisenberg was engaged in interstate commerce. *Without doubt the requirements imposed upon Eisenberg were not only burdens but very great and substantial burdens. What greater burden could there be upon him than that he should pay for his purchase a price fixed by the State.* Certainly there was no free right of purchase and sale and no bargaining.

In passing one must wonder how counsel can distinguish between the right of the State to fix a universal purchase price in local and interstate commerce and the fixing of a universal minimum sale price for the same kind of commerce.

In upholding the legality of the Pennsylvania Statute this Court in 306 U. S. at 350, said:

> "The Respondent contends that the Act, if construed to require it to obtain a license, to file a bond for the protection of producers, and to pay the farmers the price prescribed by the Board, unconstitutionally regulates and burdens interstate commerce. The State Supreme Court has held that the Statute is a valid police regulation. The Petitioner concedes that the purchase, shipment into another State, and sale there of the milk in which the Respondent deals, is interstate commerce. The question for decision is whether, in the absence of Federal Regulation the enforcement of the Statute is prohibited by Article I, Paragraph 8 of the Constitution. *We hold that it is not.* * * *
>
> "Every State Police Statute necessarily will affect interstate commerce in some degree, but such a Statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce."

A complete reading of the entire opinion sustains the argument that states can impose burdens in interstate commerce, particularly where such burdens are not discriminatory, and where, as the Court said in the *Eisenberg* case *"the activity affected by the regulation is essentially local"*. That case would seem to be more than controlling here.

We are not alone in this comment with respect to the *Eisenberg* case. Mr. Justice Black of the Supreme Court in his dissent in the case of *Hood* v. *DuMond*, 336 U. S. 558 commented on the *Eisenberg* case as follows:

> "The Eisenberg case thus sustained the power of a State to require licenses from interstate dealers and to impose conditions on their interstate commerce transactions in order to *effectuate legitimate State policy*. And the conditions Pennsylvania imposed were burdensome, as this Court recognized they erected obstacles which were bound to limit the number of interstate dealers. * * *
>
> "Pennsylvania imposed these burdens on interstate commerce to promote health and to protect its farmers from the consequences of destructive competition among dealers."

Counsel for appellants rely very heavily upon the ideas expressed in the case of *Baldwin* v. *Seelig*, 294 U. S. 511-528. This case when studied and analyzed is so different from the case at bar that one cannot help but wonder why it was referred to at all. It establishes principles which decide the contention of appellants against them. The crucial facts of that case are as follows:

The New York law fixes a minimum price for milk bought by New York dealers from New York farmers. Vermont's legislative policy left milk dealers free to fix milk prices by bargaining. Seelig, a New York dealer, sold milk in New York which had been bought from Vermont farmers at prices below that fixed for New York farmers

by New York law. The New York Milk Control Act with the aid of regulations made thereunder set up a system of minimum prices to be paid by dealers to producers. The Act had a provision whereby the protective prices to be paid to New York farmer were extended to that part of the supply which comes from other States. It provided that there should be no sale within New York of milk bought outside the State unless the price paid to the purchasers was one that would be lawful upon a like transaction within the State. This Court in holding that the Milk Control Act was invalid to this extent said:

> "New York has no power to project its legislation into Vermont by regulating the price to be paid in that State for milk acquired there. New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. Accepting these postulates New York asserts her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers of Vermont is less than would be owing in like circumstances to farmers in New York. The importer in that view may keep his milk or drink it but sell it he may not.
>
> "Such a power, if exerted, will set a barrier to traffic between one State and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported."

The real meaning of *Baldwin* v. *Seelig* is again found in Mr. Justice Black's dissent in *Hood* v. *DuMond*, 336 U. S. at 556:

> "Even though the Court regarded the Baldwin vs. Seelig law as discriminatory, other considerations were added to weight the scales on the side of invalidation. Its impact on Vermont economy and Vermont legislative power was weighed. To whatever extent it is

> desirable to reform the economic standards of Vermont, 'the legislature of Vermont and not that of New York must supply the fitting remedy.' "

And, 336 U. S. at 522:

> "Added to this was the Court's appraisal of the law *as a plain discrimination against interstate commerce that would inescapably erect a barrier* to suppress competitive sales of Vermont milk in New York, thus leading to a retaliatory 'rivalries and reprisals.' " (Emphasis added.)

It must be remembered that in the case at bar Virginia has not attempted to regulate the price of milk in the District of Columbia or the manner in which it is distributed there. It has not attempted to put pressure on the District of Columbia dairies to reform economic standards; its law is not hostile to interstate commerce in conception or operation; *its purpose in fixing minimum resale prices is to conserve health and promote economic stability among Virginia producers.* The Virginia minimum price requirement fairly administered to all distributors as it has been is not the kind that breeds rivalries and reprisals.

Appellants cite the case of *Hood* v. *Du Mond*, 336 U. S. 525-576. This case is no authority for counsel's contention. In that case Hood and Sons, a Massachusetts corporation, distributed its milk products in Boston acquiring the bulk thereof outside of Massachusetts. Two receiving stations were owned in New York State near Troy. Hood wished a permit from the New York Milk Commission for another receiving station. The station would be nearer some producers already shipping to one of Hood's stations and would also attract a number of producers who would be diverted from other buyers. Permit was denied primarily on the ground that if Hood took producers delivering milk to the local markets such as Troy, it would deprive those markets of an

adequate supply especially during the short season. The Supreme Court denied the right of the Milk Commission of New York to refuse Hood an additional permit on the ground that it was a discrimination against Interstate Commerce and that the state had no right to totally prohibit the right of Hood to purchase from additional producers in New York State merely because the milk would be transported to Boston in Interstate Commerce.

This case is wholly different from the one at bar and is different also from the case of *Baldwin* v. *Seelig, supra,* 294 U. S. 511. In the *Seelig* case the exporter was not prohibited from acquiring new stations, or new producers. He merely was required to be treated and to treat others on an equal basis. In the *Hood* case, Hood was denied any access to a new market in New York because of his interstate activities.

Be it noted that the application of the minimum sale price in Virginia is equal and universal as to all milk received by wholesaler, retailer or consumer in their respective classifications in Virginia. There is no discrimination; there is no exclusion or limitation; there is no ground or basis for retaliation; the market is open to all alike.

As the majority opinion in the case of *Hood* v. *Du Mond* stated, 336 U. S. at 530:

> "It is only additional restrictions, imposed for the avowed purpose and with the practical effect of curtailing the *volume* of interstate commerce to aid local economic interests, that are in question here, and no such measures were attempted or such ends sought to be served in the Act before the Court in the Eisenberg Case." (Emphasis added.)

And, referring to the *Seelig* case, this Court added:

> "In that case, New York placed conditions and limitations on the local sale of milk imported from Vermont designed in practical effect to *exclude* it, while here its

> order proposes to limit the local facilities for purchase of additional milk so as to withhold milk from export. The State agreed then, as now, that the Commerce Clause prohibits it from *directly curtailing movement* of milk into or out of the State." (Emphasis added.)

Referring to various decisions in the Supreme Court on the milk industry, the opinion continued, 336 U. S. at 531:

> "It recognized, as do we, broad power in the State to protect its inhabitants against perils to health or safety, fraudulent traders and highway hazards, even by use of measures which bear adversely upon interstate commerce. But it laid repeated emphasis upon the principle *that the State may not promote its own economic advantages by curtailment or burdening of* interstate commerce." (Emphasis added.)

The test repeatedly applied by the *Hood* case is that a state may not retard, burden or constrict the flow of interstate commerce *for its economic advantage*, and may not place itself in a position of economic isolation. Finally, this Court, 336 U. S. at 539, laid down the principle that would seem to apply in all such cases and ought to be a complete answer to appellants' contention in the case at bar:

> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs, duties, or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any."

Conclusion

The question presented is not of a substantial character. The appeal should be dismissed, or, in the alternative, the judgment below should be affirmed.

Respectfully submitted,

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No. 128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, a Body Corporate, et al., *Appellants*,

vs.

STATE MILK COMMISSION

Appeal From the Supreme Court of Appeals of the Commonwealth of Virginia.

BRIEF FOR APPELLEE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 128

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, a Body Corporate, et al., *Appellants,*

vs.

STATE MILK COMMISSION

Appeal From the Supreme Court of Appeals of the Commonwealth of Virginia.

BRIEF FOR APPELLEE.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Appellee, State Milk Commission of the Commonwealth of Virginia, by its counsel, respectfully urges that the judgment of the Supreme Court of Appeals of the Commonwealth of Virginia be affirmed for the reasons hereafter stated.

OPINIONS BELOW.

The opinions of the lower courts are not reported. The two opinions of the Circuit Court of the City of Richmond appear in the Record on pages 50-52 and 100-101.

The order of the Virginia Supreme Court of Appeals refusing an appeal and affirming the decision of the Circuit Court of the City of Richmond appears in the Record at page 148.

JURISDICTIONAL STATEMENT

The appellants claim that this Court has jurisdiction to review the decision of the Supreme Court of Appeals of Virginia by virtue of Title 28, U. S. Code, Section 1257.

Appellee took the position that the question was not substantial under this Honorable Court's Rule 12. This Court noted probable jurisdiction October 12, 1953.

To the question whether the issue presented is substantial should be added the question whether the appellants have standing to sue, or to prosecute this appeal.

While allegations of some small interest in the question were made in paragraph two of the petition (R. 1), this was denied by the answer. (R. 49) Appellants offered no evidence in support of their allegations, or in support of their claim to be interested parties. (R. 70-100) The appellants assert on page 7 of their brief that Arlington County Board appropriates money to buy milk for schools and jails, citing the record at pages 1 to 5 and at page 74.

Pages 1 to 5 are the petition, all of the material allegations of which as to this question, are denied in the answer (R. 49-50). Page 74 contains, with respect to this question, merely the fact that various, distributors *bid* for contracts to provide milk to "public in titutions and schools." Bidding is, of course, just the opposite of selling at a fixed price.

It is submitted that the appellants have insufficient legal right or interest to give them standing to prosecute this appeal suing either as the County Board of Arlington County, Virginia, *Smith* v. *Indiana*, 191 U. S. 138, *Pawhuska* v. *Pawhuska Oil & Gas Co.*, 250 U. S. 393; *Trenton* v. *New Jersey*, 262 U. S. 182, or, individually, as private citizens. *Moffat Tunnel League* v. *United States*, 289 U. S. 113, *Fairchild* v. *Hughes*, 258 U. S. 126; *Edward Hines Yellow Pines Trustees* v. *United States*, 263 U. S. 143. Appellants are not subjected by the Order of the Commission to any legal injury either actual or threatened. *Edward Hines Yellow Pines Trustees* v. *United States, supra.*

In view of the above, and for the reasons previously presented in the statement opposing jurisdiction, the appellee respectfully adheres to its position that this Honorable Court should dismiss this appeal.

COUNTER STATEMENT OF THE CASE.

A typical dairy, (R. 78, 80, 81, 82, 87) Chestnut Farms Dairy, sold at wholesale and retail in this market 13.77% of its total sales (R. 73, 77) and sold 33% of the total sales in this area. (R. 73) Chestnut Farms Dairy purchases milk from Virginia, Maryland, West Virginia and some from Pennsylvania. (R. 73, 98) It purchased 46.09% of its total purchases in the State of Virginia. (R. 73) Chestnut Farms Dairy purchased from Virginia 53.45% of all the milk that was purchased in Virginia by all distributors in the Arlington-Alexandria and Manassas market area and the District of Columbia. (R. 73) 28.09% of all its Virginia purchases was sold by Chestnut Farms Dairy in this market area. (R. 73)

The Virginia milk purchased by Chestnut Farms was processed, along with all other milk purchased, at its plant in the District of Columbia. (R. 73, 75) The milk and other dairy products thus processed were loaded on trucks at its plant in the District of Columbia and sales were made from these trucks in this market area both at wholesale and at retail. (R. 73, 74, 79)

Chestnut Farms operates 15 or 20 truck routes in the Arlington market area. (R. 73) The drivers in charge of the trucks are in reality salesmen and solicitors. These men solicit from door to door and from store to store selling their product. (R. 74, 80, 82) They are paid on a commission basis with a guaranteed minimum salary. (R. 80, 91) When the driver starts out with his truck in the morning he does not know the volume that he will sell that day. (R. 73, 75, 81) He sells to the stores whatever the store manager or store owner elects to buy that day. (R. 74, 75, 81) He usually makes his collections daily from the stores or restaurants and collects from the various doorstep deliveries weekly or monthly. (R. 73, 74) It is the practice of the Chestnut Farms to keep additional trucks ready at the plant to supply the emergency sales made by the various truck driver-solicitors in excess of their truck

loads. (R. 74, 75) The driver 'phones in and meets his new supply at an appointed place and the driver-solicitor proceeds from there for his additional sale. (R. 74, 75) True it is that the doorstep home owner consumer is more regular in his purchases to the extent that there is usually a standing order for one or two quarts, etc., but even these are increased or entirely cut off from time to time by notes or memoranda at the doorstep. (R. 74-81) The driver-solicitor leaves a bill at the doorstep and is paid at the doorstep and keeps his own book of account and records in his truck. (R. 82) It is true that there are some substantial number of individual consumers who send monthly checks direct to Chestnut Farms Dairy in Washington in payment of their milk bills. (R. 82) Collections for practically all wholesale sales are made in Virginia. (R. 82) It is true also that Chestnut Farms Dairy does not have a processing plant or a receiving plant in the State of Virginia or in this market. (R. 73, 75) For all practical purposes the truck is the store from which the sales are made and the driver is the solicitor, salesman and store clerk through whom the merchandise is sold and delivered to the consumer or customer and payment is made therefor. (R. 73-75, 80-82) Approximately 50% of the total milk sold by Chestnut Farms Dairy in this marketing area in Virginia is sold at wholesale and 50% at the doorstep. (R. 79)

In the year 1950 Chestnut Farms Dairy paid an income tax to the State of Virginia in the sum of $16,333.00 on business done in Virginia. (R. 75) In addition it paid for business and store licenses on the trucks the sum of $6,762.00. (R. 75) Items of similar amounts have been paid for many years. (R. 75) The District of Columbia for many years through its taxing authority has recognized this volume of business as done in Virginia and has not taxed that volume as business done in the District of Columbia. (R. 75) The record indicates that Thompson's Dairy, the next largest dairy in this area, operates in the same fashion buying 55% of its total milk in Virginia and selling 23% of its total sales in this market area. (R. 99)

The Lucerne Milk Company, which is a trade name for the milk division of Safeway Stores, (R. 89) receives its milk from shippers in Maryland and Virginia through the Maryland and Virginia Milk Producers' Association at its plant in the District of Columbia. (R. 88) The milk is processed there and packaged. (R. 88) Safeway transports milk from its District plant to its Virginia stores. (R. 88, 89) It sold in this market area 17.09% of its total milk sales. (R. 99) It sold 10½% of all Virginia sales and purchased from Virginia producers 15.03% of its total purchases of milk. (R. 99) Its Virginia sales amounted to 116.9% of its Virginia purchases. Safeway has no milk routes in Virginia but distributes all of its dairy products direct to retail customers coming to its stores. (R. 90) Safeway operates its trucks that deliver the milk from the Washington processing plant to its various stores in Virginia on the same commission basis for the truck driver as route salesmen and wholesale drivers of other distributors. (R. 90, 89)

Chestnut Farms Chevy Chase Dairy, Thompson's Dairy, Lucerne Milk Company, the Milk Division of Safeway Stores are the principal distributors who offered testimony in this proceeding. They raised no question of the right of respondent to fix minimum prices nor did they or do they contend that the fixing of a minimum sales price is a burden on them or on interstate commerce.

The testimony indicated that both wholesale and retail sales by distributors took place in Virginia (R. 77, 79), and the Circuit Court so found. (R. 101).

SUMMARY OF ARGUMENT.

I.

The sales affected by the Milk Commission order, sales from trucks in Virginia, are part of local, not interstate commerce. *Wagner* v. *Covington*, 251 U. S. 95; *Caskey Baking Company* v. *Virginia*, 313 U. S. 117.

II.

The decisions below sustained the validity of the Arlington-Alexandria Market Order No. 4, promulgated by the Virginia State Milk Commission, (R. 32) and held (1) that the Commission had the power to fix the minimum sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market Area from trucks of District of Columbia distributors, and (2) that the regulation in question does not constitute an unconstitutional burden on interstate commerce. (R. 100-101, 148)

It is submitted that the lower courts' decisions are correct and are supported by this Court's decisions in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, and *Milk Control Board* v. *Eisenberg*, 306 U. S. 346, and are not contrary to other of this court's decisions dealing with the effect of the commerce clause on state milk control legislation.

The instant regulation affects interstate commerce, if at all, only incidentally, and does not impose an undue burden thereon. It is not hostile to interstate commerce either in purpose or effect. It is non-discriminatory, applying equally to all transactions made in the market area regardless of the point of origin of the milk involved. There is consequently nothing about it which could even remotely be equated to a trade barrier which would invite or encourage rivalries and reprisals—the evils sought to be averted by the commerce clause. It bestows no local benefit by the imposition of attendant burdens on those without the state. Nor can it be said that as a practical matter it curtails the volume of interstate traffic.

The enforcement of the regulation as to *all* milk sold in the state of Virginia is vital to the interest of that state in effectively controlling its milk industry, an end held constitutionally legitimate in *Nebbia* v. *New York*, 291 U. S. 502. On the other hand, the effect of so enforcing the regulation on the national interest in maintaining the free flow of interstate commerce is, if any, negligible, and certainly not adverse. A balancing of these interests clearly points to the correctness of the decisions below and they should, therefore, be affirmed.

III.

The Federal Agricultural Marketing Agreement Act of 1937 does not preempt the field of milk regulation to the exclusion of the states.

That Act is presently inoperative in the Arlington-Alexandria area and cannot become effective until so ordered by the Secretary of Agriculture. The validity of the order of the State Milk Commission is totally unaffected by the Federal Act.

Assuming, *arguendo*, that the Act was operative, the same result would obtain. The Act specifically provides for state and federal cooperation and contemplates coexistence of state and federal programs. The Act, as construed by this Court in *Parker* v. *Brown*, 317 U. S. 341, would seem to completely answer appellants' contentions.

In addition, the federal administrative practice is entirely in accord with appellee's contentions herein.

ARGUMENT.

I.

Sale of Milk From the Trucks in Virginia Is Not Interstate Commerce.

When the instant proceeding was first heard in the Circuit Court that court found that there was insufficient factual basis for a ruling as to the claim that the order affected interstate commerce, and remanded the case to the Milk Commission for the taking of additional testimony. (R. 51) Petitioners, appellants here, offered no evidence on remand, although the other parties did, upon which evidence appellee's counter-statement, *supra*, is based. (R. 70-99) After that testimony was taken and certified to it, the Circuit Court made the following finding and conclusion, based on the facts of this case (T. 101):

> "Under the authorities cited therein as applied to the minimum price regulation in question is not a the facts of this case, the Court is of the opinion that

> burden on interstate commerce; that the State Milk Commission can legally fix the minimum sale price of fluid milk *sold and delivered to consumers* in the Arlington-Alexandria Market Area *from trucks* of the District of Columbia distributors and that Arlington-Alexandria Market Order No. 4 should be sustained." (Emphasis added.)

This decree, the Supreme Court of Appeals of Virginia held to be "plainly right." (R. 148)

It is clear, therefore, that the facts as presented on this appeal are limited strictly to sales made from trucks in the State of Virginia. It is the contention of appellee that the regulation of the price charged in such sale is not a burden on interstate commerce, because such a transaction is local, and not a part of interstate commerce. While the milk sold, it is conceded, was in interstate commerce prior to sale, such interstate commerce ceased prior to the sales which were considered by the Courts below.

What happens in the case of these truck sales may be analogized to very similar transactions which, the record here shows. (R. 88-90) These were sales by Safeway Stores from their stores located in Virginia of milk processed in the District of Columbia, transported to Virginia, and sold through the stores, all by one corporation. The sale to the customer in the store is clearly local and not a transaction in interstate commerce. Such commerce ceases after the goods come to rest in the stores, and prior to sale.

The same may be said as to the truck sales. When the trucks transport the milk from the District of Columbia across the line to Virginia they are, of course, engaged, in interstate commerce. But when, having reached their destination, a particular area or route, they commence to circulate through such area offering the milk for sale, they become a sort of moving store. The transactions which then take place are just as local as the sales from the Safeway Stores. Because the sales platform is moving,

and not stationary would be a highly technical and unreasonable differentiation.

An almost identical case to that presented on this appeal was *Wagner* v. *Covington*, 251 U. S. 95. In that case plaintiffs, manufacturers of soft drinks in Cincinnati, Ohio, sold in Covington, Kentucky, from their vehicle to various purchasers such soft drinks as the purchasers might need from time to time. The trucks carried sufficient drinks to meet the probable demands of customers but with the exception of occasional small amounts carried for delivery in response to particular orders previously received at plaintiff's plant of business in Cincinnati, all of the sales in Covington were made from the vehicle of the driver. Sometimes the driver sold his entire supply or only part of it. The sales were made in the bottles as filled in Ohio. The driver collected cash from time to time from his customers. The statement of facts in this case is almost identical with the testimony in the case at bar. In upholding the right of the City of Covington to tax the plaintiffs and to recover license fees from them under certain city ordinances the Court said beginning at p. 101:

> "If in respect to this portion of their business, Plaintiffs may be subjected to the regulatory power of the state acting through the municipality, we are not concerned with the question whether the general language of the ordinances, if applied with respect to some other method of dealing with goods brought from state to state might be repugnant to the Federal Constitution.
>
> "From the facts recited it is evident that, in essence, that part of plaintiffs' business which is subjected to regulation is the business of intinerant vendor or peddler,—a travelling from place to place within the state, selling good that are carried about with the seller for the purpose. * * *
>
> "*Of course, the transportation of plaintiffs' goods across the state line is of itself Interstate Commerce; but it is not this that is taxed by the City of Covington, nor is such Commerce a part of the business that it taxed, or anything more than a preparation for*

> *it.* So far as the intinerant vending is concerned, the goods might just as well have been manufactured within the State of Kentucky; to the extent that plaintiffs dispose of their goods in that kind of sales, they made them the subject of local commerce, and this being so, *they can claim no immunity from local regulations, whether the goods remain in original packages or not.*" [p. 103] (Emphasis supplied.)

The case of *Caskey Baking Company* v. *Virginia*, 313 U. S. 117, decides the same question with respect to bread brought from West Virginia bakeries and sold in the state of Virginia. See also: *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506.

Under the authority of these decisions, it would seem clear that sales from trucks in the State of Virginia are part of local, not interstate commerce and the distributors "can claim no immunity from local regulations, whether the goods remain in original packages or not:"

II.

The Minimum Price Regulation of the State Milk Commission Does Not Lay An Unconstitutional Burden On Interstate Commerce and the Decisions Below In So Holding Are Supported by Highland Farms Dairy v. Agnew and Milk Control Board v. Eisenberg and Are Not Contrary to Other Decisions of This Court.

This Court in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608 (1936) ruled, *inter alia*, that the Virginia Milk and Cream Act does not lay a burden on interstate commerce. The situation in respect of that ruling, pertinent here, was as follows.

Highland Farms Dairy operated a creamery for the pasteurization and treatment of milk in the District of Columbia. This milk it purchased from Virginia and Maryland farmers. The *entire output* of its bottled milk it sold to Luther W. High, a resident of the District of Columbia, who in turn sold the bottled milk from retail stores which he operated in Virginia. Highland delivered the milk to High's Virginia stores by truck (see 3-judge District

Court's Opinion, 16 F. Supp. 577, 579). Neither High nor Highland complied with the licensing provisions of the Virginia Act, and they likewise ignored the minimum price regulations promulgated thereunder by the Virginia State Milk Commission. After High was threatened by the Commission with enforcement proceedings, both High and Highland, as plaintiffs, sued for an injunction to restrain the enforcement of the Act. As to Highland, this Court said in its statement of the case at page 611:

> "No proceedings against Highland were even begun or threatened, the Commission taking the position that Highland was not subject to the prohibitions of the statute, its sales and purchases in Virginia being transactions in interstate commerce."

The opinion on the interstate commerce question was as follows, pp. 614-616:

> "3. The statute does not lay a burden on interstate commerce.
>
> "Argument to the contrary is built upon the definition of the word 'distributor' contained in § 1. We learn from that section that distributors include 'persons wherever located or operating, whether within or without the Commonwealth of Virginia, who purchase, market, or handle milk for resale as fluid milk in the Commonwealth of Virginia.' This definition, we are told, takes in the plaintiff Highland, who buys Milk and sells it in interstate commerce, and does so with the expectation that upon arrival in Virginia the milk will be resold. But Highland is not subject to the provisions of the Act, and so the Milk Commission has ruled. *No matter what the definition of a distributor may be, sales are not affected by any restriction as to price unless made within the boundaries of a designated market area.* * * * Highland in Washington may sell to High in Virginia, and High may buy from Highland, at any price they please. *Not till the milk is resold in Virginia within a market area* will the price minimum apply and then only to the price to be charged on the resale. *Cf. Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, 175; *Sonneborn Bros.* v. *Cureton*, 262 U. S.

506; *Baldwin* v. *G. A. F. Seeling, Inc.*, 294 U. S. 511. If there could be any doubt about this as a matter of construction the doubt would be dispelled by the administrative practice and by the warning of the statute, express in § 14, that operations in interstate commerce shall not be deemed to be affected. So also as to the requirement of a license expressed in § 4. High needs a license to the extent that he sells at retail to consumers in Virginia. Highland does not need one, and the Commission is not asking it to apply for one, because its business is interstate exclusively. Clumsy draftsmanship may have spread a fog about the section when viewed in isolation or taken from its setting. The fog scatters when we recall the provisions of § 14 and the administrative practice. Appellants' fears are visionary." (Emphasis supplied.)

In the instant case, District of Columbia distributors, whose raw milk is purchased from producers in Virginia, West Virginia, Maryland and Pennsylvania (R. 73, 98), sell and deliver their processed milk to consumers, restaurants, schools, stores (R. 74) in Virginia, on both a retail and wholesale basis. (R. 77, 79) The appellant interprets the *Agnew* case to hold that such operations are in interstate commerce and, hence, are not subject to the provisions of the Act. It is submitted, however, that *Agnew* properly interpreted, supports the position of the respondent herein. It held that sales made in the "market area" were subject to the Virginia's minimum price, and that if a sale of milk is made in the District of Columbia the Virginia Act does not apply to that sale regardless of the fact that the milk is delivered to the purchaser in Virginia. It is only when the milk is sold in Virginia that Virginia's Act governs. *Agnew* then may fairly be construed to mean that when milk is sold wholesale or retail outside the State of Virginia and later transported therein, the initial sale is unaffected by the Virginia Act and, conversely, if milk is sold wholesale or retail *in* the State of Virginia, the Act governs those sales.

Appellants assert on page 9 of their brief that the *Agnew* case held that the Virginia Act "did not regulate sales from District of Columbia distributors to Virginia stores". The implication of that assertion is that where the transactions between the store and the distributor take place in Virginia, the act does not apply. Such an interpretation of *Agnew*, it is submitted, is improper. It was specifically said in *Agnew* that:

> "* * * sales are not affected by any restriction as to price unless made within the boundaries of a designated market area." (Pp. 614-615)

It follows, then, that as to a wholesale transaction between a store and a District of Columbia distributor which occurred in the District of Columbia, as was the situation in *Agnew*, the Act does not apply, but where the transaction takes place in Virginia, the Act does apply. This interpretation of the *Agnew* case is entirely in accord with the present administrative practice of the State Milk Commission. The Commission said (R. 95):

> "As far as sales from distributors to either stores or homes, doorstep deliveries, we consider any such transactions as may occur within the Arlington-Alexandria market area as defined in the regulation to be under the control of the Milk Commission and to come within the scope of these regulations as regards the pricing as set forth in the regulation."

It is submitted that appellants are in error when on page 13 of their brief they say that the above stated position of the Commission is an "about face" departure from its position taken in the *Agnew* case. The position of the Commission now is the same as it was then. *Agnew*, as has been demonstrated above, held that Highland's milk sold to High *in Washington* was not subject to the act, and in respect of the administrative practice the Court said, page 615:

"If there could be any doubt about this as a matter of construction, the doubt would be *dispelled by the administrative practice* and by the warning of the statute, expressed in § 14, that operation in interstate commerce shall not be deemed affected * * *. High needs a license to the extent that he sells to consumers in Virginia. Highland does not need one, and the Commission is not asking it to apply for one, because its business as now conducted with persons in Virginia is interstate exclusively."[1] (Our emphasis.)

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[1] Some confusion, however, was injected in this matter by the word "sales" as used by the court in *Agnew* when it said on page 611:

> "No proceedings against Highland were begun or were threatened, the Commission taking the position that Highland was not subject to prohibitions of the statute, its *sales* and purchases in Virginia being transactions in interstate commerce." (Emphasis supplied.)

That the fact that the transaction of sale occurred in Washington controlled the decision in *Agnew* is apparent from a reading of the entirety of the opinion of this Court and that of the three-judge District Court. The latter, 16 F. Supp. 575, summarized plaintiff's contention in part as follows, page 580:

> "(V) The Act and the regulations passed by the Milk Commission are invalid because they constitute an interference on the part of the state with interstate commerce in that (1) they required the Highlands Farms Dairy, a corporation of the District of Columbia, *doing no business in Virginia* to secure a license in order to engage in interstate commerce; (2) and fixed the prices to be paid by High to Highland Farms Dairy for milk sold to him by the corporation *in the District of Columbia*, and (3) authorized the Commission to levy an assessment on milk shipped in interstate commerce." (Emphasis supplied.)

And on page 579 the Court said:

> "The bottled milk distributed by High in Virginia is sold to him *in the District of Columbia* but is delivered to his Virginia stores by the dairy trucks upon orders received by telephone." (Emphasis supplied.)

And on page 588,

> "* * * but when it is borne in mind that [Highland] is not required by the Act to be licensed or to sell at prices fixed

Indeed, Chestnut Farms Dairy is taxed by the State of Virginia on the income received from business done therein, which business is the distribution of milk involved in this case. (R. 75) Chestnut Farms also pays the State of Virginia for business and store licenses on its trucks used in that distribution. (R. 75)

In view of the foregoing it is submitted that the *Agnew* case is clear authority in support of the rulings of the courts below.

In *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511 (1935), a New York milk dealer, G. A. F. Seelig, purchased its milk from a creamery in Vermont which in turn was supplied by Vermont producers. The milk was transported to New York in forty-quart cans. In New York 90% of the milk was sold to consumers in the original cans, the remaining 10% being bottled there and sold to consumers in bottles. "By concession" title passed from the creamery to Seelig in Vermont. The New York Milk Control Act and regulations thereunder fixed minimum prices to be paid by dealers to producers. A provision of the Act prohibited the sale of milk in New York which had been purchased elsewhere "unless the price paid to the producers was one that would be lawful upon a like transaction within the

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by the Commission, since it is located in Washington and is not a distributor in any market designated by the Commission, it is seen that the Act does not forbid High from purchasing milk *from the dairy in the District of Columbia* or fix the price which he shall *there* pay." (Emphasis supplied.)

In addition, the District Court said that the Act would "doubtless" be "invalid as a direct and unconstitutional burden on interstate commerce" *if* the Act were given the meaning ascribed to it by the plaintiffs. In so concluding, the Court relied upon this Court's decision in *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511. In that case it was conceded that title to the milk passed to the distributor in a state other than the state whose legislation (which was held unconstitutional) forbade the sale of that milk because it has been acquired by the distributor from foreign producers at a price less than that which it could have lawfully been purchased for from domestic producers.

state". The price paid by Seelig to the Vermont Creamery was lower than the minimum price payable to producers in New York. Because it refused to agree to comply with the Act, Seelig was refused a license and, electing to sell the milk without a license, sued to enjoin the enforcement of the Act. This court enjoined the enforcement of the Act both as to the milk sold in the original cans and that sold in bottles on the ground that the Act directly burdened interstate commerce. The court said on pp. 521-22:

> "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there. So much is not disputed. New York is equally without power to *prohibit the introduction within her territory* milk of wholesome quality acquired in Vermont, whether at high prices or low ones. This again is not disputed. Accepting those postulates, New York asserts her power to *outlaw* milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers of Vermont is less than would be owing in like circumstances to farmers in New York. *The importer* in that view may keep his milk or drink it, but sell it he may not.
>
> "Such a power, if exerted, will set up a *barrier* to traffic between one state and another *as effective as if customs duties*, equal to the price differential, had been laid upon the thing transported. * * * 'It is the established doctrine of this court that a state may not in any form directly burden the prosecution of interstate business.' *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 112; and see *Brennan* v. *Titusville*, 153 U. S. 289; *Brown* v. *Houston*, 114 U. S. 622; *Webber* v. *Virginia*, 103 U. S. 344, 351; *Kansas City Southern Ry. Co.* v. *Kaw Valley Drainage District*, 233 U. S. 75, 79. Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed *purpose* of the *obstruction*, as well as its *necessary tendency*, is to *suppress* or *mitigate* the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. * * * A chief occasion of the commerce clause was

'the mutual jealousies and aggression of the states, taking form in customs barriers and other economic retaliations. * * * if New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to *rivalries* and *reprisals* that were meant to be averted by subjecting commerce between the states to the power of the nation." (Emphasis supplied.)

And beginning on page 524:

"* * * the *exclusion* of milk paid for in Vermont below the New York minimum will tend, it is said, to impose a higher standard of quality and thereby promote health. We think the argument will not avail to justify *impediments* to commerce between the states." * * * [Page 527] "What is ultimate is the principle that one state in its dealings with another may not place itself in a *position of economic isolation.* * * * Neither the power to tax nor the police power may be used by the state of destination with the *aim and effect* of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a *rampart* of customs duties designed to neutralize the advantages belonging to the place of origin. * * * [Page 528] It is one thing for a state to exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets. It is a very different thing to establish a wage scale or a scale of prices *for use in other states* and to bar the sale of the products, whether in the original packages or in others, unless the scale has been observed." (Emphasis supplied.)

The *Seelig* case has no application here because in that case, as demonstrated above, there was (1) discrimination present; (2) the New York Act sought by indirection to regulate producer prices in other states; and (3) to enforce that Act would in effect establish a direct bar or

barrier against competition with products of another state.

Here there is no discrimination [2] against milk from other states. The application of the minimum sale price in Virginia is equal and universal as to all milk received by wholesaler, retailer or consumer in their respective classifications. There is no exclusion or limitation. There is no barrier against competition and consequently nothing to invite or encourage rivalries and reprisals sought by the commerce clause to be averted. "A tariff barrier between states, moreover, presupposes a purpose to prefer those who are within the barrier; where no such preference appears there can be no justification for reprisals and there is consequently little probability of them." (Frankfurter, J., dissenting in *Hood & Sons* v. *DuMond*, 336 U. S. 525, 570). No such preference appears here. It cannot be said that the price fixing order of the State Milk Commission will in its practical operation work discrimination against interstate commerce. The appellants say only (page 7 of their brief) that:

> "The [Arlington] county is competitive with other parts of the Washington Metropolitan area, and its prosperity requires that it be free from restraints not imposed in other areas. As elected representatives of the people and responsible to them and spending tax funds, it brings this appeal to carry out its statutory functions of bringing suit to protect the general welfare of its people."

The fixing of a minimum selling price of fluid milk under the Virginia Act, Title 3, 1950 Code of Virginia, Section

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[2] In this connection it is apparent from the following language of this court in *Seelig* that the effect of that case herein, if any, is to decide the contentions of appellants against them. The court said on page 526:

> "A state tax upon merchandise brought in from another state, or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminatory in its incidence against the merchandise because of its origin in another state. *Sonneborn Bros.* v. *Cureton*, . . . at p. 516."

359 (See Appendix A, Appellants' brief), and regulation (R. 32) does not in purpose or effect regulate prices elsewhere, but, on the contrary, has exclusively local application in furtherance of the regulation and control of the milk industry of the state, the power to do which was held constitutional in *Nebbia* v. *New York*, 291 U.S. 502.

The *Nebbia* case held that it was within the police power of the state of New York to fix the selling price for milk. The reasons given in that case why the milk industry is such that it inherently requires special methods of control should, we think, be here reproduced verbatim, even at the risk of a rather long quotation. This Court said beginning at p. 517:

> "The production and distribution of milk is a paramount industry of the state, and largely affects the health and prosperity of its people. Dairying yields fully one-half of the total income from all farm products. Dairy farm investment amounts to approximately $1,000,000,000. Curtailment or destruction of the dairy industry would cause a serious economic loss to the people of the state.
>
> "In addition to the general price decline, other causes for the low price of milk include a periodic increase in the number of cows and in milk production, the prevalence of unfair and destructive trade practices in the distribution of milk, leading to a demoralization of prices in the metropolitan area and other markets, and the failure of transportation and distribution charges to be reduced in proportion to the reduction in retail prices for milk and cream.
>
> "The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. Under the best practicable adjustment of supply to demand the industry must carry a surplus of about 20 per cent, because milk, an essential food, must be available as demanded by consumers every day in the year, and demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several

factors difficult to control. Thus surplus milk presents a serious problem, as the prices which can be realized for it for other uses are much less than those obtainable for milk sold for consumption in fluid form or as cream. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milk-shed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor. The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price-cutting and other forms of destructive competition. Smaller distributors, who take no responsibility for the surplus, by purchasing their milk at the blended prices (i.e., an average between the price paid the producer for milk for sale as fluid milk, and the lower surplus milk price paid by the larger organizations) can undersell the larger distributors. Indulgence in this price-cutting often compels the larger dealer to cut the price to his own and the producer's detriment.

"Various remedies were suggested, amongst them united action by producers, the fixing of minimum prices for milk and cream by state authority, and the imposition of certain graded taxes on milk dealers proportioned so as to equalize the cost of milk and cream to all dealers and so remove the cause of price-cutting.

"The legislature adopted Chapter 158 as a method of correcting the evils, which the report of the committee showed could not be expected to right themselves through the ordinary play of the forces of supply and demand, owing to the peculiar and uncontrollable factors affecting the industry.

• • • • • • • • • • •

"The milk industry in New York has been the subject of long-standing and drastic regulation in the public interest. The legislative investigation of 1932 was persuasive of the fact that for this and other reasons unrestricted competition aggravated existing

evils and the normal law of supply and demand was insufficient to correct maladjustments deterimental to the community. The inquiry disclosed destructive and demoralizing competitive conditions and unfair trade practices which resulted in retail price cutting and reduced the income of the farmer below the cost of production. We do not understand the appellant to deny that in these circumstances the legislature might reasonably consider further regulation and control desirable for protection of the industry and the consuming public. That body believed conditions could be improved by preventing destructive price-cutting by stores which, due to the flood of surplus milk, were able to buy at much lower prices than the larger distributors and to sell without incurring the delivery costs of the latter. In the order of which complaint is made the Milk Control Board fixed a price of ten cents per quart for sales by a distributor to a consumer, and nine cents by a store to a consumer, thus recognizing the lower costs of the store, and endeavoring to establish a differential which would be just to both. In the light of the facts the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk. [P. 530]

* * * * * * * * * * *

"But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. [PP. 531-2]

The above makes it crystal clear that the ability efficiently to control its milk industry is of vital concern to the State of Virginia. Efficacious regulation of the industry demands that the state have the power to enforce the minimum sale price as to *all* milk sold within its borders. The effect of the exercise of such a vitally needed state power upon the broad national interest in an unobstructed flow of

interstate commerce, if any, is insignificant. A balancing of such state and national interests clearly requires that the judgment below be affirmed.

In *Hood & Sons* v. *DuMond*, 336 U. S. 525, petitioner Hood, a distributor of milk in Massachusetts who operated three receiving plants in the State of New York, sought a license from that state for the operation there of a fourth in furtherance of its distribution of milk in Massachusetts. Pursuant to a provision of the Agricultural & Marketing Law of New York the issuance of the license was forbidden if the Commissioner should find that issuing it would tend to a destructive competition in a market already adequately served and would not be in the public interest. The Commissioner so found and denied the license, stating, *inter alia*, as a further reason for the denial, that granting the license would draw off local milk badly needed in local markets. The Court of Appeals of New York sustained the Commissioner. This Court reversed on the ground that the New York law violated the Commerce Clause of the Federal Constitution, specifically holding that New York did not have the power to deny additional facilities to acquire and ship milk in interstate commerce where the grounds of the denial are that such limitation upon interstate business will protect and advance local economic interests. In so holding the Court saw the "erection of a barrier to traffic between one state and another" with the resultant evil effects condemned in the *Seelig* case, which case the Court said presented the "converse of the present situation". The Court discountenanced the restriction as one "imposed for the avowed purpose and with the practical effect of curtailing the *volume* of interstate commerce to aid local economic interests".

Obviously the situation in *DuMond* is totally unlike that in the instant case. There is no curtailment of the volume of interstate commerce even alleged here. There is no barrier to interstate traffic. The practical effect of the Act and regulations is not to exclude milk from the Dis-

trict of Columbia. They do not express hostility toward those engaged in interstate commerce or practically obstruct its conduct. Indeed District of Columbia distributors sell ⅔ of the total milk sold in the Arlington-Alexandria market. (R. 86, 99)

It seems appropriate here to point out that this court has said that undisputed generalities about the freedoms of commerce from state encroachment are not determinative of the question of the fate of state legislation in cases where interstate commerce interpenetrates the states. The question must be resolved by the weight of the circumstances and the practical and experienced judgment in applying those generalities to the particular instances. The problem is to harmonize national and state interest without sacrificing either. *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 212. And in *Parker* v. *Brown*, 317 U. S. 341, 362, this Court said:

> "Such regulations are to be sustained, not because they are 'indirect' rather than 'direct', see *Di Santo* v. *Pennsylvania*, 273 U. S. 34 . . . *cf. Wickard* v. *Filburn*, 317 U. S. 111 . . ., not because they control interstate activities in such a manner as only to effect the commerce rather than to command its operations. But they are upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of safety, health and well being of local communities, and which because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress."

It is submitted that the interests of the State of Virginia to be served by the minimum milk price regulation as administered by the State Milk Commission are great. If so-called "interstate commerce milk" could be brought in from other states and sold on a cut-price basis in Virginia, the state would soon be a dumping ground for surplus milk at various seasons and the whole price structure would

be destroyed. The State of Virginia would be wholly unable to protect the very industry that the *Nebbia* case says it has a right to protect. On the other hand, it cannot be said, as a practical matter, that the effect, if any, of the regulation upon the national interest in the freedom of interstate commerce is any more than innocuously trivial.

Appellants contend neither that there is too much nor that there is too little competition in the Arlington market area. They simply want District of Columbia distributors to be allowed to engage in unrestricted competition with Virginia milk in the hope that milk will then be cheaper than it is. But if such were allowed to occur, not only would the regulation of the state milk industry be seriously impaired, but as regards the residents of Arlington and Alexandria, the benefit of cheaper milk today may well be illusory because of the likelihood of its resulting in more expensive milk tomorrow, should such unrestricted competition place some one District of Columbia distributor in control of the market. Indeed the very purpose behind milk control laws is to prevent price-cutting and other destructive and demoralizing trade practices which accompany unrestricted competition in the milk industry.[3]

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[3] In this connection this Court's attention is respectfully directed to the language of the preamble of the Virginia Milk and Cream Act.

> "Whereas, the production and distribution of milk and cream is an industry upon which, to a substantial degree, the prosperity and health of the people of the Commonwealth of Virginia depend; and the present economic emergency is in part the result of the disparity between the prices of milk and cream and other commodities, which disparity has diminished the power of milk producers to purchase industrial products, has broken down the orderly production and marketing of milk and cream, and has seriously impaired the agricultural assets supporting the credit structure of the Commonwealth and local political sub-divisions thereof; and
>
> "Whereas, unhealthful, unfair, unjust, destructive and demoralizing economic trade practices have grown up, and are now carried on in the production, sale and distribution of milk, and milk and cream products in the Commonwealth, which

Again, if the *DuMond* case is applicable here at all, it supports the contention of the respondent by reason of the following language from that case at page 529:

> "Production and distribution of milk are so intimately related to public health and welfare that the need for regulation to protect those interests has long been recognized and is from a constitutional standpoint hardly controversial. Also, the economy of the industry is so eccentric that economic controls have been found at once necessary and difficult. There have evolved detailed, intricate and comprehensive regulations, including price-fixing. They have been much litigated but were generally sustained by this court as within the powers of the state over its internal commerce, as against the claim that they violated the Fourteenth Amendment."

Of the decisions of this Court which have ruled upon the validity *vel non* under the commerce clause of state milk control legislation, it is submitted that the rulings of the courts below are supported not only by *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, *supra* (as has already been demonstrated), but also by *Milk Board* v. *Eisenberg*, 306 U. S. 346.

In that case Eisenberg Co., a milk dealer, purchased milk from producers in Pennsylvania and there placed it in receiving tanks preparatory for shipment into New York

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impair the dairy industry in the Commonwealth, and the constant supply of pure wholesome milk to the inhabitants thereof, and constitute a menace to the health and welfare of the inhabitants of the Commonwealth; and

"Whereas, in order to protect the well-being of the people of the Commonwealth of Virginia, and to promote the public welfare, public health and public peace, the production, transportation, processing, storage, distribution, and sale of milk and cream in the Commonwealth of Virginia, is hereby declared a business affecting the public peace, health and welfare, which should be supervised and controlled in the exercise of the police power of the Commonwealth in the manner hereinafter provided; now, therefore, * * *". Acts of Assembly of Virginia, 1934, Chapter 357.

for sale there. The Pennsylvania Milk Act *inter alia* fixed the prices to be paid by milk dealers to producers for milk. The statute defined a milk dealer as any person who purchases or handles milk within the Commonwealth for sale, shipment, storage, processing or manufacture *within* or *without* the Commonwealth. Eisenberg Co. contended that it need not comply with the statute because its milk was in interstate commerce and the Act, if applicable to it, unconstitutionally regulated and burdened interstate commerce. This Court ruled against that contention and held that the effect of the law on interstate commerce was incidental and not forbidden by the Constitution, in the absence of regulation by Congress. This Court said on page 351:

> "The grant of the power of regulation to the Congress necessarily implies the subordination of the states to that power. This Court has repeatedly declared that the grant established the immunity of interstate commerce from the control of the states respecting all those subjects embraced within the grant which are of such a nature as to demand that if regulated at all, their regulation must be prescribed by a single authority. But in matters requiring diversity of treatment according to the special requirements of local conditions, the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority. * * * Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should Congress determine to exercise its paramount power, the state law might thereby be restricted in operation or rendered unenforceable. * * * [p. 352] The activity affected by the regulation is essentially local in Pennsylvania. Upon the completion of the transaction the respondent engages in conserving and transporting its own property. * * * [p. 353] If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or part of

the milk they purchase is destined to another state the uniform operation of the statute locally would be crippled and might be impracticable. Only a small fraction of the milk produced by farmers in Pennsylvania is shipped out of the Commonwealth. There is, therefore, a comparatively large field remotely affecting and wholly unrelated to interstate commerce within which the statute operates. These considerations we think justify the conclusion that the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress."

Except for the fact that *Eisenberg* was concerned with producer prices, the situation there involved the converse of that in the instant case. The principles discussed in that case are alike applicable to the activity involved here which is irrefutably essentially local in Virginia. *Eisenberg*, then, is clear authority in support of the judgments below.

Of the above discussed cases it may be said by way of summary and abstract analysis that:

As to *interstate* milk:

1935 *Seelig:* The state in which the distributor wanted to sell its milk could not *exclude* that milk to protect and advance local economic interests.

1936 *Agnew:* The state in which a distributor wishes to sell its milk has the power to regulate the price of the sale.

1939 *Eisenberg:* The state in which the distributor purchased the milk from producers has the power to regulate the price of the purchase.

1949 *Hood:* The state from which the distributor wished to take its milk could not *withhold* the milk to protect and advance local economic interests.

Or, stated otherwise.

As to *interstate* milk:

The state in which the distributor makes the transaction has the power to control that transaction by regulating the price.

Agnew
Eisenberg

The state in which the distributor wishes to make a transaction cannot prevent the making of that transaction (on grounds of local economic self interest) by *excluding* the milk.

Seelig

The state in which a distributor transaction is *not* made cannot prevent the making of that transaction (on grounds of local economic self interest) by withholding the milk.

Hood

It is submitted that there runs through these cases a thread of consistency which to be maintained requires that this court affirm the judgment below.

III.

The Validity of the Virginia Act and the Regulation Promulgated Thereunder As Administered By the State Milk Commission Is Unimpaired by the Agricultural Marketing Agreement Act.

The appellants apparently argue that by reason of the mere adoption of the Federal Agricultural Marketing Agreement Act, 7 U. S. C. § 601, *et seq.*, and the erstwhile (1945-47) regulation thereunder of producer prices in the Arlington area, (R. 7-31, 10, 30) the State of Virginia is without power to fix the minimum sales price of milk sold and delivered in the Arlington-Alexandria area by District of Columbia distributors. Appellants' precise position in this connection seems, to the respondent at least, rather

obscure, as does the line of reasoning employed in support thereof. It is submitted, however, that appellants' contentions are wholly without merit.

The problem involved is one which cannot be resolved, as appellants seem to imply it can, by the rigid application of generally framed tests. It is one which calls for a determination of how far a particular Federal regulation supersedes state legislation, and that determination must be made by accommodating the competing demands of the state and national interests involved, just as similar considerations are determinative of the question whether a particular state regulation does or does not unduly hamper the freedom of interstate commerce.

In the first place, the Federal Act is not presently in force in the Arlington-Alexandria market area and the Act becomes effective only if a program is ordered by the Secretary of Agriculture. *Parker* v. *Brown*, 317 U. S. 341, 353. These considerations alone would seem to be dispositive of the entire question.

Appellants, however, assert that "The fact that Federal regulations have not been made effective does not result in conferring jurisdiction upon the state". That argument apparently presupposes that the regulation of the milk industry is a subject which inherently requires a uniform national rule or a uniform system of regulation, and hence a subject the power to regulate which is exclusively reserved to Congress. But such is not the case. The milk industry is inherently such that local diversity of treatment is imperative. It will not admit of uniformity of treatment even on the state level, let alone the Federal.[1]

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[1] This is made abundantly clear by the words of Justice Black, dissenting in *Hood & Sons* v. *DuMond*, 336 U. S. 525, 546:

> "In determining whether a milk market is 'adequately served' the state follows a plan similar to the federal law in that both divide the country into 'marketing areas'. Under this plan, the state legislatures did not attempt to prescribe one rule applicable throughout the whole state limiting the number of milk dealers or the number of their plants. A

The power, then, to regulate the milk industry in a manner in which interstate commerce is only incidentally affected resides in the states, though subject to the paramount power, if exercised, of Congress. That the Virginia statute and regulation as applied herein lie within the legitimate ambit of the state's police power seems clear. That power, therefore, need not be "conferred".[2] It was said by this court in *Fruman* v. *Hewit*, 329 U. S. 249, 253, that:

> "A police regulation of local aspects of interstate commerce is a power often essential to the state in safeguarding vital local interests. At least until Congress chooses to enact a nationwide rule the power will not be denied to the state."

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single rule of this kind would have lacked the necessary flexibility to accommodate the varying needs of markets in different parts of the state."

And also by the language of Justice Jackson, speaking for the majority in the *Hood* case, quoted on page 25 of this brief. And by the following words of Justice Frankfurter, dissenting in *Hood*, on page 566:

> "Some of the principles relevant to decision of this case are settled beyond dispute. One of these is that the prevention of destructive competition is a permissible exercise of the police power. *Nebbia* v. *New York*, 291 U. S. 502; *United States* v. *Rock Royal Co-operative*, 307 U. S. 533; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 395. Another is that a state is not barred from licensing an activity merely because it is in interstate commerce. Even more basic is the principle that as to matters which do *not* demand that regulation be uniformly present or uniformly *absent*, see *Cooley* v. *Board of Wardens*, 12 How. 299, the state may impose its own requirements 'even though they materially interfere with interstate commerce.' *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 188. And only recently, be it noted, this Court has characterized the buying of milk for out-of-state shipment on 'essential local' business. *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, 352." (emphasis supplied)

[2] On page 35 of their brief appellants conclude with the statement "• • • that the State Milk Commission has no authority from Congress to regulate interstate milk prices, particularly in the absence of Federal regulation which was ousted by vote of the farmer-producers in 1947."

Furthermore, in *Cooley* v. *Board of Wardens,* 12 How. 298, 318, this Court said:

> "If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner convey to the states that power."

The *Cooley* case, in the words of Justice Black, dissenting in *Hood* v. *DuMond,* 336 U. S. 525, 551, decided:

> "* * * that the commerce clause *per se* only prohibited state regulation of local interstate commerce activity which 'are in their nature national, or admit *only* of one uniform system.' It was also held at p. 320 that the commerce clause left states free to regulate interstate commerce activity where diverse conditions incident to different customs, habits, and trade practices, could best be treated and regulated by different regulations 'drawn from local knowledge and experience, and conformed to local wants.'" (emphasis supplied)

Appellants argue that the "silence of Congress does not authorize the states to regulate interstate commerce".[3]

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[3] In support of this statement, appellants quote from:

(1) *Brennan* v. *Titusville,* 153 U. S. 299, at 302. But the Court there was dealing with a license tax which it deemed to be a direct burden on interstate commerce.

(2) *Bowman* v. *Chicago,* 125 U. S. 465, 485, but the quoted words were taken from a quotation in that case from *Cooley* v. *Board of Port Wardens,* 12 How. 299, which quotation in full follows:

> "The subjects indeed upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the states which consist in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone

With that isolated statement, as generally phrased, we will not disagree and will concede that in the relations of the states to the regulation of interstate commerce by Congree there is a field in which the state cannot interfere at all, even in the silence of Congress. But it must be assumed that appellants have in mind the instant situation and, that being so, appellants seem to have overlooked the rule as stated in *Oregon-Washington Co.* v. *State of Washington*, 270 U. S. 87, 102, (cited in appellants' brief on p. 21) that:

> "[the] rule is that there is a field in which the local interests of the States touch so closely upon interstate commerce that in the silence of Congress on the subject, the States may exercise their police powers;"

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can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of the purpose that the commerce in that commodity, or by that means of transportation, shall be free. There would otherwise be no security against conflicting regulations of different states, each discriminating in favor of its own products and against the products of citizens of other states. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation against conflicting and discriminatory state legislation."

(3) *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298. But that case was concerned with natural gas, and held that the sale of it in wholesale quantities, not to consumer, but to distributing companies for resale to consumers in numerous cities in different states was wholly interstate, the paramount interest in which was national, not local, admitting of and requiring uniformity of legislation, which uniformity was necessary to preserve the equality of opportunity and treatment among the states, even though it be the uniformity of governmental non-action. Court, however, recognized that the line of division is not clearly marked between cases where, in the absence of Congressional action the state is authorized to act and those where state action is precluded by the commerce clause *per se*, and stated that, in the absence of Federal legislation, the state could constitutionally enact laws of internal police power although they may incidentally affect interstate commerce. That the regulation of the milk industry is within the latter area is clear. *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608; *Milk Control Board* v. *Eisenberg Co.*, 306 U. S. 346; and *Nebbia* v. *New York*, 291 U. S. 502.

Which rule, it is submitted, obviously applies here.

Appellants' argument, carried to its logical conclusion, is that the mere fact of the adoption of the Federal act, regardless of whether it is or is not in operation in any particular area, precludes regulation of the milk industry by *all* states in areas where those regulations only incidentally affect interstate milk. Judicial sanction of such an argument would seriously undermine the very foundation of state milk control legislation. That this court will not lend its support to such a contention was strongly indicated by its expression in *Hood & Sons* v. *DuMond*, 336 U. S. 525, *supra*, in connection with an Agricultural Marketing Agreement Act question raised there. The court said at page 542:

> "The Congressional regulation contemplates and permits a wide latitude in which the State may exercise its police powers over the local facilities for handling milk. We assume, though it is not necessary to decide that the Federal Act does not preclude a state from placing restrictions and obstructions in the way of interstate commerce for the ends and purposes always held permissible under the commerce clause."

In a field where Congress has acted the test of the validity of state action is whether the Federal legislation *necessarily* has excluded state action, *Oregon-Washington Co.* v. *State of Washington*, 270 U. S. 87, *supra*, or otherwise stated, whether the Congressional legislation manifests the intention to occupy the entire field to the exclusion of the states. Moreover, "The intention of Congress to exclude states from exerting their police power must be clearly manifested". *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 611.

Title 7 U. S. C. § 610(i) provides in part:

> "The Secretary of Agriculture upon the request of duly constituted authorities of any state is directed, in order to effectuate the declared policy of sections . . . 608 C [para. (5) of which deals with fixing milk pro-

> ducer prices] . . . of this title and in order to obtain uniformity in the formulation, administration and enforcement of Federal *and* State programs relating to the regulation of the handling of agriculture commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any state, and is authorized to *cooperate* with such authorities; * * * to issue orders . . . *complementary to orders or other regulations issued by such authorities;* * * *"* (Emphasis supplied). (See Appendix B of appellants' brief.)

There could hardly be a more positive Congressional declaration (1) that the Federal Act does not exclude the states from regulating their respective milk industries in the exercise of their police power; (2) that the Federal Act was not intended to occupy the entire field; and (3) that the act contemplated the operation side by side of state and federal programs. Indeed, the Federal act clearly envisions the operation of state regulatory programs before, during, and after administration of a Federal program. Cooperation between Federal and state authorities is specifically provided for. "Where the Government has provided for collaboration the courts should not find conflict." (*Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 209.)

Speaking of the Act and the section above quoted therefrom, this Court said in *Parker* v. *Brown*, 317 U. S. 341, *supra*, at p. 354:

> "From this and the whole structure of the Act, it would seem that it contemplates that its policy may be effectuated by a state program either with or without the promulgation of a federal program by the order of the Secretary."

Cf. *Reid* v. *Colorado*, 178 U. S. 137.

There appears on page 20 of appellants' brief the statement:

> "In Virginia, of course, the regulation of retail milk prices in interstate commerce indirectly regulates the prices paid to producers, which the Federal legislation *would* directly regulate." (Our emphasis).

This seems to suggest that, were the Federal Act in force, the resultant producer price regulation thereunder would cause a direct conflict with the state program under which other than producer prices are regulated, which conflict would be fatal to the state program. Since the Federal Act, in fact, is not in effect, that question would seem to be moot, but assuming it is not moot, it is submitted that there would not exist a fatal conflict.

As a general proposition it is true that state legislation is superseded by Federal regulation where there exists a direct and positive conflict between the two, or where the conflicting regulations apply precisely to the same subject or where, though the state and Federal regulations do not cover the same subject, the necessary effect of the enforcement of the former would materially interfere with the successful application of the latter. But none of those situations is involved in the instant case. By hypothesis the regulation of producer prices would very likely affect retail prices to some extent. But to say that regulation of producer prices indirectly *regulates* retail prices, or vice versa, is misleading, and, we submit, erroneous. To regulate a price is not to affect it, but to fix it. Were the Federal Act in effect, the state and Federal programs could exist harmoniously side by side. They would have their separate spheres of operation.

The Secretary of Agriculture has expressly recognized again and again that the Agricultural Marketing Agreement Act of 1937 does not preempt the field so as to preclude state regulations. For example, the milk marketing program for the New York milk marketing area is a joint Federal-state program. The order issued by the Secretary of Agriculture for the New York milk marketing area was issued on August 5, 1938 (3 F. R. 1945), and it provided that:

> "This order shall become effective after the issuance by the Commissioner of Agriculture and Markets of the State of New York of an order containing pro-

visions similar to the provisions of this order and to which this order shall be complementary."

The milk marketing program for the New York metropolitan marketing area has been continued since 1938 as a joint Federal-state program. In the Federal Register of October 10, 1953 (18 F. R. 6458) the Secretary gave approval to certain amendments to that program, and the Secretary's decision states:

> "The regulatory program for the New York metropolitan marketing area is a joint Federal-State program. The Federal order and the State order are complementary, and both orders contain, in all material respects, identical provisions. In the case of the original promulgation of the orders, and each amendment to the orders, joint hearings have been held and the amendments to both orders have been identical in all material respects. This program has been administered in accordance with the principles of procedure set forth in the agreement or memorandum of understanding executed on August 26, 1938, by the Secretary of Agriculture of the United States and the Commissioner of Agriculture and Markets of the State of New York."

The contemporaneous and settled administrative interpretation and administrative practice, over a period of more than 15 years, shows that state regulation may be made effective in the absence of Federal regulation, and also state regulation may be complementary to Federal regulation. That contemporaneous and settled administrative interpretation should not be overturned unless clearly wrong or unless a different construction is plainly required. *United States* v. *Jackson*, 280 U. S. 183, 193; *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 549; *Boutell* v. *Walling*, 327 U. S. 463, 470-471; *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116. But emphatically the administrative interpretation and the administrative practice are in accord with the plain language of the Federal statute which ex-

pressly recognizes state regulation. Although the Federal statute vests in the Secretary of Agriculture the full reach of the commerce clause (*United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 123) and the Secretary may exert his authority to the ultimate (*Titusville Dairy Products Co.* v. *Brannan*, 176 F. 2d 332, 334-336 (C. A. 3), certiorari denied, 338 U. S. 905), nonetheless the Secretary may regulate not at all—as in this case—or he may provide for limited regulation. In the case at bar there is no Federal regulation in effect; and certainly in the absence of Federal regulation, state regulation is permissible. *Milk Board* v. *Eisenberg Co.*, 306 U. S. 346, 351. Also, see, *International Shoe Company* v. *Pinkus*, 278 U. S. 261, 265; *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 152.

In accordance with express recognition in the Federal Act of the authority of states to provide for regulation, numerous states have statutory enactments which authorize state boards or commissions to regulate or provide for the regulation of the marketing of milk. A holding that would nullify state regulation in this case would also strike down regulation under numerous other state statutes, see, *e.g.*, Ala. Code 1940, Tit. 22, §§ 205-231; Ark. Statutes 1947, Vol. 7, § 82-913, *et seq.*; Deering's Agr. Code of Calif., Ann., § 736.10, *et seq.*; Gen. Statutes of Conn. 1949 Rev., § 3120, *et seq.*; Fla. Statutes Ann., § 501.13, *et seq.*; Ga. Code Ann., § 42-551, *et seq.*; West's La. Statutes Ann., Tit. 40, § 898, *et seq.*; Ann. Laws of Mass., ch. 94A, § 12A; Mo. Rev. Statutes Ann. § 14124; Rev. Laws of New Hampshire, ch. 196, § 6; New Jersey Statutes Ann., Tit. 4 § 12A-22; McKinney's Consolidated Laws of New York Ann., Art. 21, § 258-m; Gen. Statutes of North Carolina Ann., ch. 106, § 262; Oregon Comp. Laws Ann., Tit. 34, § 1012; Purdon's Pennsylvania Statutes Ann., Tit. 31, §§ 700j-806; Utah Code Ann. 1953, ch. 5, §§ 2-4 and 3-11.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this Court should dismiss this appeal, or, in the alternative, affirm the judgment below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 128

THE COUNTY BOARD OF ARLINGTON COUNTY, a Body Corporate, *et al.*,

Appellant,

vs.

STATE MILK COMMISSION,

Appellee.

Appeal From the Supreme Court of Appeals of the Commonwealth of Virginia.

APPELLEE'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO JURISDICTION.

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APPELLEE'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO JURISDICTION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Pursuant to the request made by this Court during oral argument on January 4, 1954 the appellee, State Milk Commission of Virginia, by its undersigned Counsel, respect-

fully submits the following in support of its assertion that the Arlington County Board, appellant herein, lacks status to prosecute this appeal and that this Court, therefore, should dismiss this appeal.

PROCEEDINGS BELOW.

By its Order No. 4, the State Milk Commission, *inter alia*, increased the fixed minimum retail and wholesale selling prices of fluid milk in the Arlington-Alexandria market area. From that order an appeal [1] was taken to the Circuit Court of the City of Richmond, Virginia by "The County Board of Arlington County, Virginia, a body Corporate; and Florence E. Cannon, Chairman, F. Freeland Chew, Alfred E. Frisbe, Robert W. Cox, Daniel A. Dugan, Members of the County Board *Petitioners*" (our emphasis). Petitioners considered themselves "aggrieved" by the Commission's Order alleging in Par. 2 of their Petition (R. 1)

> "The County of Arlington, Virginia, is a purchaser of milk, and the above named petitioners, members of the Arlington County Board, are residents of Arlington County, and they are purchasers and consumers of milk and cream at retail delivered to them in said county, and said members of the Arlington County Board are representative of numerous other purchasers and consumers of milk and cream residing in said County; and in their capacity on said Board said members are charged with the duty of taking such measures as they may deem expedient to secure and

[1] *Code of Virginia*, 1950:

> "§ 3-369. Appeals to Supreme Court of Appeals and to circuit court of Richmond.—• • • Any person aggrieved by an order of the Commission fixing, revising or amending the price at or the terms upon which milk may be bought or sold, or by any other general action, rule, regulation or order of the Commission, may within forty days after the effective date of such action, rule, regulation or order, appeal therefrom to the circuit court of the city of Richmond. (1934, p. 564; 1940, p. 431; Michie Code 1942, § 1211bb.)"

promote the health, safety, and general welfare of the inhabitants of said County."

As to this paragraph, the State Milk Commission in its Answer to the Petition, stated (R. 49):

> "The respondent is not advised as to the allegations contained in paragraph 2 of the petition and neither denies nor affirms the facts set forth therein."

Paragraph 5 of the Petition alleged (R. 2):

> "5. A major proportion of the milk and cream purchased and consumed by residents in Arlington County, including milk and cream consumed by said petitioners and their families, is processed and bottled in the District of Columbia by distributors which transport such milk and cream in motor vehicles from said District and deliver such milk directly to the residences of retail consumers in Arlington County, Virginia, in the original packages, which movements and sales of milk and cream were and are in interstate commerce; and the State Milk Commission presumed to fix prices of milk and cream so moving in interstate commerce, and by said Order No. 4 such prices were increased by the Commission."

These allegations the Commission neither admitted nor denied. (R. 49)

Petitioners prayed (R. 4) for an order of the Richmond Circuit Court declaring the Commission's Order "null and void, and beyond the authority and jurisdiction of the . . . Commission in so far as they relate to interstate commerce in milk or cream" contending in substance that the Commission:

> "* * * has no authority or jurisdiction to regulate the retail prices of milk or cream which have been processed and bottled in the distributors' plants in the District of Columbia and transported by trucks of any such distributor from the District of Columbia and delivered in the original package or bottle by such distributor directly to the residence door of consumer-

purchaser at retail in Arlington County, State of Virginia." (R. 3)

Petitioners prayed also for an order requiring the Commission to revise and change its rules and regulations "so as to clearly state that the prescribed prices and other rules and regulations do not apply to interstate commerce beyond the authority and jurisdiction of [the] Commission.[2] (R. 5)

The record before the Richmond Circuit Court was "devoid of a factual basis for a consideration of the question of interstate commerce" (R. 52) and that Court therefore, pursuant to Title 3-371, Virginia Code 1950,[3] remanded the case to the State Milk Commission "for the taking of additional testimony as offered by the petitioners, the defendant or any other interested party relating to milk moving in interstate commerce in connection with the Arlington-Alexandria market area." (R. 52-53) (R. 50-53)

On remand, petitioners offered no evidence either in support of their allegation in respect to the interstate commerce question or in support of their claim to be interested parties (R. 70-100). Evidence adduced by others established that the milk in question was sold and delivered to purchasers in the state of Virginia (R. 77, 79) and that milk is supplied to public schools under contract awarded

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[2] In this connection it should be noted that Title 3-381, Virginia Code, 1950, provides, in respect of the Milk and Cream Act:

> "Not applicable to interstate commerce.—No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto. (1934, p. 566; Michie Code 1942, § 1211jj.)"

[3] "• • • Additional testimony shall not be taken before the court, except to clarify the record or to introduce evidence as to the effect of the order upon the business of parties to the record below, or of producers standing in the same position as producer parties of record, but the court may, in proper cases, remand the record to the Commission for the taking of such further testimony as was not available upon the hearing appealed from, or such other testimony as the court shall provide may be taken. • • •"

the "successful bidder". (R. 74) Also at the hearing on remand the State Milk Commission, in respect of its administrative practice with reference to the control of milk, stated that (R. 95):

> "* * * As far as sales from distributors to either stores or, to homes, doorstep deliveries, we consider any such transactions, as may occur within the Arlington-Alexandria market area as defined in the regulation, to be under the control of the Milk Commission and to come within the scope of these regulations as regards to the pricing as set forth in the regulations."

On the record as supplemented on remand the Richmond Circuit Court found in accordance with the evidence of record that: (R. 101)

> "* * * the minimum price regulation in question is not a burden on interstate commerce: that the State Milk Commission can legally fix the minimum sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria market area from trucks of the District of Columbia distributors and that Arlington-Alexandria Market Order No. 4 should be sustained."

That Court then by decree (R. 101-2) sustained the Commission's Order and dismissed the appeal holding that: (R. 102)

> "* * * Order No. 4 establishing a minimum sale price for milk in the . . . Arlington-Alexandria market area does not constitute an unconstitutional burden on interstate commerce and that the State Milk Commission can lawfully establish the minimum sale price of fluid milk sold and delivered to consumers in [the] area, irrespective of the point of origin of the milk so delivered."

From the order of the Richmond Circuit Court there was filed in the Supreme Court of Appeals of Virginia a

"Petition for Appeal for Writ of Errors".

That petition was captained: (R. 105)

> "The County Board of Arlington County, Virginia, et als. *Complainant*", (Our emphasis)

And began:

> Your *petitioner*, the County Board of Arlington County . . . represents that *it* is aggrieved by a final decree . . . of the Circuit Court of the City of Richmond. * * *" (Our emphasis)

And concluded:

> "The question of law raised in the Assignments of Error have never been passed upon by this Honorable Court. The questions involved have a public, as well as a private, importance, and it is submitted that the decision of the lower Court should be reviewed, *not alone for the benefit of the complainant who has been aggrieved by the Order of the lower Court, but, also, for the future guidance of public authorities and private individuals in this Commonwealth.*
>
> * * *
>
> "Your *Petitioner requests* * * *" (Our emphasis)

And was signed:

> "The County Board of Arlington County, Virginia."

It appears that at this point in the proceedings the members of the board either as individuals or in their official capacity were dropped as parties, leaving only the County Board, as such, as the sole appellant in both the Supreme Court of Appeals of Virginia and in this Court, as will further appear in portions of this Memorandum to follow.

The Supreme Court of Appeals of Virginia entered an order refusing an appeal and affirming the decree Circuit Court holding that said decree was "plainly right". (R. 148)

Thence the appeal to this Court.

An inspection of the papers on file with this Court reveals that the members of the County Board are not before

this Court as appellants and that Counsel for the County Board did not even *purport* to bring them here. The "Petition for Appeal" in this Court reads as follows:

> "* * * The above-named complainant-appellant, the Arlington County Board, a body corporate which is the Governing body of Arlington County, considering itself aggrieved by the final decree . . . does hereby pray . . . that an appeal be allowed * * *. . . . that an order be made with respect to an appeal bond to be given by complainant-appellant * * *."
>
> * * *
>
> "Respectfully submitted,
>
> For the Arlington County Board,
> Complainant Appellant * * *"

Also, it should be noted that the "principal" on the Bond for Costs (R. 151) (not printed in the transcript of record) filed with this Court is the "County Board of Arlington County", the names of the members of which neither being referred to therein nor appearing thereon. An Order signed by the late Chief Justice Fred M. Vinson allowed the appeal "as prayed for" and at no time was an appeal prayed for on behalf of the members of the Board as individuals. In his brief, counsel for the appellant does not say that the members of the Board are before this Court as individual appellants. He says only that "The members of the Board who were individually named as *complainants in the original action,* were and their successors are individual consumers of milk in Arlington County." (Our emphasis) Confusion in this respect has resulted from the manner in which the papers on file have been captioned and possibly by the word "their" appearing twice in the body of the "Order Allowing Appeal" to this Court, above referred to. (R. 151)

In this Court the appellant on page 7 of its Brief asserts:

> "The Arlington County Board is a body corporate with specific right to sue and be sued, and empowered to take such measures as it may deem expedient to

secure and promote the health, safety, and general welfare of the inhabitants of said county. *The members of said Board, who were individually named as complainants in the original action, were and their successors are individual consumers of milk in Arlington County.* The Board appropriates funds to buy milk for its jail and schools (R. 1-5, 74). Its ordinance regulates sanitation standards for milk. The county is competitive with other parts of the Washington Metropolitan Area, and its prosperity requires that it be free from restraints not imposed in other areas. As elected representatives of the people, and responsible to them and spending tax funds, it brings this appeal to carry out its statutory functions of bringing suit to protect the general welfare of its people.

"The relief sought *by the Arlington County Board* is an order from the State Courts declaring the regulation of interstate commerce to be beyond the authority of the State Milk Commission and that the Commission be required to revise its rules and regulations to exclude regulation over interstate commerce (R. 4-5)." (Our emphasis)

ARGUMENT.

I.

The Arlington County Board Has No Standing to Prosecute This Appeal Because It Is a Creature of the State and Has No Privileges or Immunities Under the Federal Constitution Which It May Invoke in Opposition to the Will of the State.

Counties of Virginia are parts of the state; political subdivisions of the state created by the sovereign power for the exercise of the functions of local Government. *Fry* v. *County of Albermarle*, 86 Va. 195; *Fidelity & Deposit Company of Maryland* v. *Gill*, 116 Va. 86.

The following sections of the Code of Virginia, 1950, seem pertinent here:

"§ 15-1. DEFINITIONS. * * *:

"(1) The term "*board of supervisors*" shall mean the board of supervisors or other governing body, as the case may be, of a county.

* * *

"§ 15-3. How Counties May Sue and Be Sued.—Counties may sue in their own names for forfeitures, fines or penalties given by law to such counties, or upon contracts made with them; and, subject to the provisions of §§ 15-260 and 15-261, may be sued in their own names in the circuit court of such county, and the process instituting such suit may be executed by being served on the Commonwealth's attorney of the county. (Code 1919, § 2686.)

"§ 15-4. How Board of Supervisors May Sue: Seal.—The board of supervisors of any county, by the name of 'The Board of Supervisors of _____ county,' may sue and be sued in relation to all matters connected with their duties as such board, and have a seal and alter the same at pleasure. (Code 1919, § 2710.)

"§ 15-8. General Powers of Boards of Supervisors.—In addition to the powers conferred by other sections, the board of supervisors of every county shall have power:

* * *

"(5) To adopt such measures as they may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of their respective counties, *not inconsistent with the general laws of this State.* * * * (Our emphasis)

In *Pawhuska* v. *Pawhuska Oil & Gas Co.*, 250 U. S. 394 (1919) the City of Pawhuska, Oklahoma, brought an action against State of Oklahoma and the Pawhuska Oil & Gas Co., complaining of an order of the Corporation Commission of the State regulating the rates and services of the gas company which supplied natural gas to the city and its inhabitants. The city claimed that the power to regulate the rates of public utilities located within its limits had been prior thereto irrevocably delegated to it by the state; that the city had exercised that right by entering into a contract with (and under which a franchise was granted to) the Gas Company under which contract the city reserved to itself the authority to regulate rates and services; and that subsequent state legislation creating and giving the state commission power to regulate all utilities and to fix rates

and an order of that commission increasing rates of the Gas Company, impaired the obligation of the city's contract in violation of the contract clause of the Constitution of the United States. The state court rejected this contention; and this Court, in dismissing the city's writ of error, said:

> "Dealing with this contention the state court, while fully conceding that the earlier statute delegated to the city the authority claimed by it, held that this delegation was to endure only 'until such time as the state saw fit to exercise its paramount authority;' that under the state Constitution the legislature could withdraw that authority from the city whenever, in its judgment, the public interest would be subserved thereby; and that it was effectively withdrawn from the city and confided to the Corporation Commission by the Act of 1913. The claim that this impaired the franchise contract was overruled.
>
> "It is not contended—nor could it well be—that any private right of the city was infringed, but only that a power to regulate in the public interest, theretofore confided to it, was taken away and lodged in another agency of the state,—one created by the state Constitution. Thus the whole controversy is as to which of two existing agencies or arms of the state government is authorized for the time being to exercise in the public interest a particular power, obviously governmental, subject to which the franchise confessedly was granted. In this no question under the contract clause of the Constitution of the United States is involved, but only a question of local law, the decision of which by the supreme court of the state is final.
>
> "'Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state.

> Neither their charters nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution." *Hunter* v. *Pittsburgh*, 27 U. S. 161, 178, 52 L. ed. 151, 159, 28 Supp. Ct. Rep. 40."

See also *Trenton* v. *New Jersey*, 262 U. S. 182 (1923); and *Williams* v. *Mayor and City Counsel of Baltimore*, 289 U. S. 36 (1933).

In Section 301, p. 556, of *Robertson and Kirkham Jurisdiction of the Supreme Court of the United States*, by Richard F. Wolfson and Philip B. Kurland, it is said:

> "The doctrine that municipal corporations created by the state for the better ordering of government and being subject to abolition by the state at any time have no privileges or immunities under the federal Constitution which they may invoke in opposition to the will of the state, has been a frequent basis for the *per curiam* disposition of cases brought to the Supreme Court."

and on page 560, *ibid.*, it is said:

> "The controlling consideration appears to be that the state may at any time terminate the existence of the municipal corporation altogether; hence it cannot be said to possess constitutional rights inconsistent with the existence of the power in the state."

In the instant case the State Milk Commission has exercised a power given it by statute in furtherance of the promotion of the general welfare of the inhabitants of the state. The County Board opposes the power as exercised on the same ground, to wit, "to secure and promote the health, safety, and general welfare of the inhabitants of said county". The conflict is direct. On the authority of the cases cited above it seems the state's will must prevail since the county has no standing to oppose it.

This Court under the "Pawhuska" doctrine will not act as referee in such a controversy. There is, therefore, no substantial Federal question presented for this Court's decision. This appeal should be dismissed for that reason alone.

The above cases would seem also to be a complete answer to appellant's argument impliedly made in its "Memorandum Reply as to Jurisdiction" that the County Board has standing before this court to represent citizens thereof as *parens patriae*.

If anyone represents the inhabitants of Arlington County as *parens patriae* in this action, it would seem to be the State Milk Commission, not the Arlington County Board. *Cf. Massachusetts* v. *Mellon*, 262 U. S. 447.

II.

The County Board Has No Standing to Prosecute This Appeal for the Further Reason That It Is Unaffected by the Order of the Commission.

The County Board purchases its milk under bid contract, the antithesis of making purchases subject to a fixed minimum price. (R. 74) The order of the Commission fixes the minimum wholesale and retail selling prices. Since the Board is neither a wholesale or retail purchaser it is unaffected by the minimum price order. For a litigant to prevail in this Court, it must show that enforcement of the challenged judgment would derive it—not another—of some right arising under the constitution or laws of the United States. *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-op. Assn.*, 276 U. S. 70; *Smith* v. *Indiana*, 191 U. S. 138. How, then, can it be said that the County Board is "aggrieved"?

III.

Assuming, Arguendo, the Members of the County Board as Individuals Are Before This Court as Appellants, They Are Without Standing to Prosecute This Appeal Because They Lack Sufficient Legal Interest in the Litigation to Give Them That Standing.

As has been demonstrated on pages 6 and 7 of this Memorandum, the members of the Board are not parties to this appeal but assuming, *arguendo*, they are, it is submitted that their interest in this controversy is legally insufficient to give them standing to prosecute this appeal.

Appellee is aware of no case which would support their claim to have that standing. Their interest, if any, would seem to be nothing more than a sentiment such as may be entertained by the members of the general public that if the Order of the Commission is nullified they *might* be able to purchase milk from District of Columbia distributors for less than they now purchase it—if, in fact, they do or would buy from those distributors. (None of these individuals testified, although invited to do so by the order of the Circuit Court of Richmond. For aught that appears they do not purchase milk at all, or if they do, they may all have bought from Alexandria Dairy or one of the other local distributors.) (R. 87) Such a sentiment would seem to clearly be insufficient in law. *Cf. Moffat Tunnel League* v. *United States*, 289 U. S. 113 (1933) in which a similar "sentiment" in an analogous situation was held not to constitute a legal interest. And certainly they have no right to compel the District of Columbia distributors to sell below the minimum price which the distributors in Virginia who both buy and process ther milk within the state must obey. *Cf. Edward Hines Yellow Pines, Trustees* v. *United States*, 263 U. S. 143 (1923) *infra*. Appellee does not know even at this late stage of the proceedings just what is the nature of the "right", if any, asserted or could be asserted on behalf of the members of the Board as individuals.

This Court said in *Fairchild* v. *Hughes*, 258 U. S. 126, 129-13:

> "Plaintiff has only the right, possessed by every citizen, to require that the government be administered according to law, and that the public moneys be not wasted. Obviously, this general right does not entitle a private citizen to secure by indirection a determination whether a statute, if passed, or a constitutional amendment about to be adopted will be valid."

and in *Massachusetts* v. *Mellon*, 262 U. S. 447, 486-87:

> "But the relation of a taxpayer of the United States to the Federal government is very different. His interest in the moneys of the Treasury—partly realized from taxation and party from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation of any payment out of the funds so remote, fluctuating, and uncertain that no basis is afforded for an appeal to the preventive powers of a court of equity.
>
> "The administration of any statute likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public, and not of individual, concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect to the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained."

The cases from which the above language is taken are not directly in point, at least not for the proposition presently being discussed, but we think that language pursuasive here and worthy of consideration.

IV.

Neither the County Board Nor Its Members Have Standing to Prosecute This Appeal Because They Have Been Subjected to No Legal Injury Actual or Threatened.

Edward Hines Yellow Pines Trustees v. *United States*, 263 U. S. 143 (1923) was an appeal by complainants from a decree of the District Court of the U. S. for the Northern District of Illinois dismissing a bill filed to set aside an order of the Interstate Commerce Commission. This Court affirmed. The facts were as follows:

The Interstate Commerce Commission entered an order requiring carriers to cease and desist from collecting a penalty charge of $10 per day on lumber held at reconsignment points. The plaintiffs were large lumber manufacturers and dealers whose shipments were made direct from the mills to destination and whose competitive situation would suffer if the carriers ceased to collect the penalty charges. Plaintiffs sought to set aside the order of the Commission on the ground that the order "deprives railroads of the use of their property without due process of law in violation of the 5th amendment, to the plaintiffs' detriment who are interested in maintaining both a wholesome lumber business and effective transportation [as prospective carriers]." The U. S. moved to dismiss the bill on the ground that plaintiffs had not shown such an interest in the subject matter as would entitled them to sue, and also for want of equity. In affirming the dismissal the Court said (pp. 147-149):

> "The mere fact that plaintiffs were not parties to the proceedings in which the order was entered does not constitute a bar to this suit. For it is brought to set aside an order alleged to be in excess of the Commission's power. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 49, 56 L. ed. 83, 88, 32 Sup. Ct. Rep. 22; *Skinner & E. Corp.* v. *United States*, 249 U. S. 557, 63 L. ed. 772, 39 Sup. Ct. Rep. 375. But plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power

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to order the penalty charges canceled. They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do. *It is not alleged that the carriers wish to impose such charges, and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered. Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. But plaintiffs have no absolute right to require carriers to impose penalty charges.* Compare *Interstate Commerce Commission* v. *Chicago, R. I. & P. R. Co.*, 218 U. S. 88, 111, 54 L. ed. 946, 957, 30 Sup. Ct. Rep. 651. * * *

"The further claims of plaintiffs are, if possible, even more unsubstantial. They fear that, by reason of the order, they may, in the future, suffer in times of car shortage through the greater use of cars for storage. They fear that the equipment to be used in connection with the railroad which they expect to operate may be diverted, at some time in the future, from transportation uses. If their fears are realized it will be open to them to apply to the Commission for relief. As the plaintiffs do not show any interest which entitles them to sue, we have no occasion to consider either the power of carriers to impose the penalty charge, or the power of the Commission to order its cancellation." (Our emphasis)

On the authority of the *Yellow Pines* case, it seems clear that the Board or its members certainly have no right to require District of Columbia distributors to sell milk below the minimum price. Furthermore, there has been no allegation or proof that the distributors *wish* to sell below the minimum price, and but for the order of the Commission would do so. In the vernacular of the *Yellow Pines* case, "for aught that appears the [distributors] are well satisfied with the order entered." It would appear, therefore, that, as did the plaintiffs in *Yellow Pines*, the Board has failed to show that the order of the Commission has sub-

jected them (or it) to "legal injury either actual or threatened."

In *Massachusetts* v. *Mellon*, 262 U. S. 447, 448, this Court said:

> "We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justifiable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. *The party who invokes the power must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.* If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case."

In Section 297 of *Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States*, supra, it is said at page 543:

> "It results that in every case coming to the Supreme Court, whether invoking the exercise of its original jurisdiction or seeking review of the decision of state or lower federal court, it is a jurisdictional prerequisite that the Supreme Court be satisfied that the suit involves the vindication of rights personal to the parties thereto, which are entitled to and susceptible of protection by judicial action in that proceeding, and which are being invaded, or the invasion of which is certain and impending.
>
> "No one is immune from making this jurisdictional showing."

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Since the appellants are subjected to no actual or threatened legal injury, appellee can conceive of no order which this Court could issue which would afford them any practical and beneficial relief. Certainly, this Court cannot compel the District of Columbia distributors to sell milk below the minimum price in Virginia. The application of the judicial mind to this case would seem to be a futility.

CONCLUSION.

For the foregoing reasons and for the reasons previously presented in appellee's "Statement Opposing Jurisdiction", appellee respectfully adheres to the position that this Honorable Court should dismiss this appeal.

Respectfully submitted,

J. Lindsay Almond, Jr.,
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Richmond, Virginia;

Thomas M. Miller,
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Richmond, Virginia;

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In The
Supreme Court Of The United States
OCTOBER TERM, 1953

No. 128

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, A BODY CORPORATE, ET AL.,
Appellants,

vs.

STATE MILK COMMISSION

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

APPELLANTS' MOTION FOR LEAVE TO FILE PETITION and PETITION FOR REHEARING

This motion and petition are filed following the order of the Court entered on January 18, 1954, in the above-entitled matter:

> "*PER CURIAM*: The judgment is affirmed. *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346. Mr. Justice Black dissents."

Under amended Rule 33 the petition for rehearing was due 15 days later.

MOTION FOR LEAVE TO FILE PETITION

Appellant, by counsel, moves for leave to file this petition for rehearing after the 15 day period. Counsel gives as the reason for this motion his overlooking of the amendment to Rule 33. Counsel, in checking the time limit, initially was governed by the 25 day time of the original rule, until he found too late that the rule had been amended. This petition is being filed within the 25 day period.

Undersigned counsel certifies that this motion is made in good faith and not for delay; that time is not important in the case and will not prejudice appellee; and that this matter deserves rehearing by the Court for reasons stated below.

Wherefore, the Court is requested to grant leave to file this petition which follows.

Respectfully submitted,

MALCOLM D. MILLER, *Attorney for Arlington County Board.*

PETITION FOR REHEARING

With leave granted, appellant requests that the Court rehear the matter in the above-entitled proceeding, upon the following grounds:

1. There was insufficient time to argue the Commerce Clause issue in the original hearing, particularly because of limited time under the summary docket, and diversion of the argument at that time to the question of jurisdiction.

2. The *Eisenberg* case, which governed the Court in its *Per Curiam* decision, is not applicable to the Arlington situation here involved. Appellant contends, that, if the Court would rehear the matter, and fully explore the scope of the *Eisenberg* case, it would conclude that the cited case covers a distinguishable situation, and should not govern the Arlington case. The opinion in the *Eisenberg* case is sufficient, in itself, to show that it is not applicable, and was not intended to cover the Arlington factual situation.

ARGUMENT

The Eisenberg Case Is Not Applicable

The basic principle, upon which to distinguish the *Eisenberg* case from the Arlington situation, is found in many cases beginning with those which initiated Federal regulation by administrative agencies. The basic principle is that while States may regulate Commerce *within* a State, even though interstate commerce is incidentally affected, in the absence of regulation by Congress; a State has no power to regulate commerce directly between a point in the State and a point *outside* the State.

The first part of the above principle was established in the *Granger Cases* (*Munn* v. *Illinois* and others, 94 U.S. 113,

155, 164, 179, 180). The Supreme Court held, in those cases, that a State could regulate warehouses and railroads within a State even though interstate commerce was involved, in the absence of Congressional action. But, the latter part of the principle was established in *Wabash, &c., Railway Co.* v. *Illinois*, 118 U.S. 557; in which this Court held that Illinois had no power to regulate railroad rates between points in that State, on the one hand, and a point outside the State. As a result of this decision, Congress enacted the Interstate Commerce Act to cover a situation needing regulation over which the States had no control.

Factually, there is the same basic difference between the *Eisenberg* case and the Arlington situation. In the *Eisenberg* case the milk was purchased from Pennsylvania farmer-producers, at a Pennsylvania receiving plant, by Eisenberg as a Pennsylvania corporation. The transaction was entirely *within* Pennsylvania, and incidental to State regulation of intrastate commerce. The facts are quite similar, therefore, to those in the *Granger Cases*.

But the Arlington situation is different. Two-thirds of the milk consumed in the Arlington-Alexandria market area moves by trucks from the District of Columbia distributors directly to consumers and purchasers. All of the milk from the District of Columbia comes from producers in Maryland, Virginia, West Virginia, and Pennsylvania. This factual situation is like that in the *Wabash* case, in which this Court held that the States had no power to regulate rates (or prices).

It may be observed that the Arlington situation is primarily one of interstate commerce, with incidental regulation of intrastate commerce as a minor segment. On the other hand, as this Court pointed out in the *Eisenberg* case, the regulation of prices paid by Eisenberg was incidental to general State regulation of intrastate commerce. All of this

is emphasized in the *Eisenberg* opinion, as follows (306 U.S. 346, 352-353):

> "The purpose of the statute under review obviously is to reach a domestic situation in the interest of the welfare of the producers and consumers of milk in Pennsylvania. Its provisions with respect to license, bond, and regulation of prices to be paid to producers are appropriate means to the ends in view. The question is whether the prescription of prices to be paid producers in the effort to accomplish these ends constitutes a prohibited burden on interstate commerce, or an incidental burden which is permissible until superseded by Congressional enactment. That question can be answered only by weighing the nature of the respondent's activities, and the propriety of local regulation of them, as disclosed by the record.
>
> The respondent maintains a receiving station in Pennsylvania where it conducts the local business of buying milk. At that station the neighboring farmers deliver their milk. The activity affected by the regulation is essentially local in Pennsylvania. Upon the completion of that transaction the respondent engages in conserving and transporting its own property. The Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York. If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to another state the uniform operation of the statute locally would be crippled and might be impracticable. Only a small fraction of the milk produced by farmers in Pennsylvania is shipped out of the Common-

> wealth. There is, therefore, a comparatively large field remotely affecting and wholly unrelated to interstate commerce within which the statute operates. These considerations we think justify the conclusion that the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress."

As the language of the *Eisenberg* case itself demonstrates, the Court was careful to apply the rule of the *Granger Cases*.

In another paragraph of the *Eisenberg* opinion, which follows those quoted above, the Court distinguished other decisions; and those other decisions followed the *Wabash* case principle. There are many other applications of the principle, as outlined below.

The *Wabash* principle was followed in two of the cases cited in the *Eisenberg* case, in which the U. S. Supreme Court held that a State could not regulate grain prices paid to farmers by elevators, including the margin of profit between the elevator cost and market prices outside North Dakota, *Lempke* v. *Farmers Grain Co.*, 258 U.S. 50. In *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189, 199, the Court specifically pointed out the differences in the principles applicable to the different situations.

In milk cases the same distinction is made. In *Baldwin* v. *Seelig*, 294 U.S. 511, this Court held that New York could not regulate prices paid Vermont producers by New York distributors. In *Hood* v. *DuMond*, 336 U.S. 525, this Court held that New York could not regulate export of milk to Massachusetts. In *Highland Farms Dairy* v. *Agnew*, 300 U.S. 608, this Court said (p. 615):

> "Highland in Washington may sell to High in Vir-

ginia, and High may buy from Highland, at any price they please. Not till the milk is resold in Virginia within a market area will the price minimum apply, and then only to the price to be charged on the resale."

These cases differ from the *Eisenberg* case in that the transactions involved situations to and from points outside the State boundaries.

As stated in the *Eisenberg* decision (306 U.S. 352): "The question can be answered only by weighing the *nature* of the respondents *activities.*" The conclusion to be drawn from that statement is that, if the ***nature*** of the activity is one ***within*** a State, and regulated incidental to intrastate commerce, it is subject to State jurisdiction in the absence of Federal occupancy of the field. But, if the ***nature*** of the activity involves direct ***crossing*** of the State boundary, then the State has no power.

The above distinction is observed in tax cases, as illustrated by the difference between ***use*** and ***sales*** taxes, where the use is within a State, and the sale involves crossing a boundary. See *McLeod* v. *Dilworth Co.*, 322 U.S. 327. See also *Freeman* v. *Hewit*, 329 U.S. 249.

In transportation cases, the same distinction is observed. States are not allowed to "restrict the free flow of commerce across State lines:" *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 770, in which case this Court held that a State could not limit the length of trains moving through the State. In *Spector Motor Service Co.* v. *O'Connor*, 340 U.S. 602, this Court held invalid a franchise requirement to do business in a State as applied to a motor carrier engaged only in carrying goods across the State boundary.

In itinerant merchant cases, there is the same distinction. In *Memphis Steam Laundry* v. *Stone*, 342 U.S. 389, a privi-

lege tax was held invalid as applied to a Tennessee corporation which merely solicited business in Mississippi for laundry and cleaning done in Tennessee. See also the cases cited in that opinion. The distinction is quite clear in the peddler case of *Wagner* v. *Covington*, 251 U.S. 95. There, a manufacturer of soft drinks transported them from Cincinnati, Ohio, to Covington, Ky., and afterwards sold them in a peddling activity found to be subject to city license regulation in Covington. However, the Court also said (pp. 100-101):

> "It is indisputable that with respect to the goods occasionally carried upon plaintiffs' wagon from one State to the other in response to orders previously received at their place of business in Cincinnati, plaintiffs are engaged in interstate commerce, not subject to the licensing power of the Kentucky municipality."

Here there was a difference of activity *within* a State as contrasted with an activity *across* the boundary. The net result was much the same as between seller and buyers, and in the same vehicles, but there was enough difference in the *nature* of the activity to make a complete difference in the scope of the State powers.

In the Arlington situation, the record shows that about 75 percent of deliveries to consumers homes, by the leading District of Columbia distributors, are on a pre-order basis, and the remainder are changes in those orders arranged between the consumers and the delivery drivers (R. 74, 81). While there is some difference between milk and soft drinks, there should be no difference in the principle to be applied. The activity is not subject to State regulation.

The above-cited cases are not based upon "burdens" or "discriminations", and the like, which are problems in num-

erous cases under the Commerce Clause. The writer of this petition contends, however, that *only* in the cases involving activities *within* a State (*Granger Case* situations), should the question of discrimination or burdens be material. In the *Wabash* case, situations involving direct *crossing* of State lines, the State has no power; and the question of discrimination or burden is not material to the issues.

Likewise, the occupancy of the field by Federal legislation is material only in the *Granger Case* situations, as only the Federal government would have regulatory power in the *Wabash* type of activity. But there is exercise of Federal authority in this milk price regulation. Under Title 28, U.S. Code, sections 601, 608c, et seq., the Federal government regulates farmer-producer prices if the latter so desire. The only State regulation recognized in the statute is State cooperation in the Federal scheme, sec. 610i. Producer prices are at the base of all other prices, of course. The Virginia order sets producer prices, although the State Commission disclaims authority over sales to District of Columbia distributors. But it is impossible to regulate other sales without beginning with producer prices. When the farmer-producers voted-out Federal regulation in March 1947 (R. 30-31), State regulation supplanted Federal regulation which has been ousted and thwarted.

CONCLUSION

Appellant contends that this Arlington situation should come within the principle of the *Wabash* case line of precedents, as outlined above in which activities *across* the State line are not within the jurisdiction of the State; and that the *Eisenberg* case is not applicable because it comes under the different principle of the *Granger Cases* and others, involving activities *within* a State.

The Court is respectfully petitioned to rehear the matter, to determine whether it should change its order of January 18, 1954.

Respectfully submitted,

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Munsey Building, Washington 4, D. C.

February 12, 1954.

JANUARY 18, 1954.

Per Curiam Decisions.

No. 128. COUNTY BOARD OF ARLINGTON COUNTY ET AL. *v.* STATE MILK COMMISSION. Appeal from the Supreme Court of Appeals of Virginia. Argued January 4, 1954. Decided January 18, 1954. *Per Curiam:* The judgment is affirmed. *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346. MR. JUSTICE BLACK dissents. *Malcolm D. Miller* argued the cause and filed a brief for appellants. *Roger J. Whiteford* argued the cause for appellee. With him on the brief were *J. Lindsay Almond, Jr.*, Attorney General of Virginia, and *Thomas M. Miller*, Assistant Attorney General.